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UNITED STATES SUPREME COURT
OCTOBER, 1990 TERM

QUALITY TECHNOLOGY COMPANY

Plaintiff-Appellant

VS.

STONE & WEBSTER ENGINEERING COMPANY, INC.; STEMAR CORPORATION; BETA, INC.; and STEVEN A. WHITE

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Can the well-established case law for determining when an independent contractor is entitled to claim governmental immunity as set forth in this Court's decisions of Yearsley v. W.A. Ross Construction Company, 309 U.S. 18 (1940) and Boyle v. United Technologies Corp. 487 U.S. 500(1988) be ignored simply because at some point in the course of a wrongful conspiracy one of the contractors was given the power by a government agency, without the specific authorization of Congress, to "act like" a federal employee and exercise the discretion of the government while still retaining his separate identity and the benefits of being an independent government contractor?

II.

Can an independent contractor claim official immunity for discretionary acts performed under a contract with a government agency that is in violation of 18 U.S.C. §208(a) when the acts complained of are the specific acts that violate §208(a)?

III.

Can the lower court depart from established precedent and grant qualified immunity to all defendants when there is evidence the defendants terminated plaintiff's employment for pretextual reasons and by a method of publicly disseminating false information about the plaintiff in connection with the termination from government employment that has resulted in injury to the plaintiff?

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None of the decisions, orders or opinions issued in this case by any of the courts below have been published.

GROUNDS FOR JURISDICTION

Plaintiff's action was dismissed by the United States District Court for the Eastern District of Tennessee on March 27, 1989 on a finding that all of the defendants were entitled to claim the immunity of a government official as a bar to all claims by the plaintiff. Plaintiff's Motion for Reconsideration was denied June 1, 1989, and appeal was taken. The Court of Appeals for the Sixth Circuit affirmed per curium the District Court on August 2, 1990, with adoption of the written opinion of the trial court and a rehearing was denied on October 19, 1990.

Appeal is now sought on a writ of certiorari pursuant to 28 U.S.C. §1254(1) for the following reasons:

(a) A grant of official immunity to government contractors who are exercising their own discretion, without specific congressional authority to so do, is in conflict with applicable decisions of this court.

(b) The grant of both absolute and qualified immunity to all defendants to this action is such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATUTES INVOLVED

The impact of engaging in activity that violates the federal conflict of

interest statute on the ability to claim the immunity of a government official for acts that are the very type of activity that violates 18 U.S.C. §208(a) is at issue in this case. The full text of the statute is produced in the Appendix.

STATEMENT OF THE CASE

The plaintiff Quality Technology Company, commonly referred to as QTC, is a company that was contracted with in April, 1985 by the Tennessee Valley Authority (TVA) to provide expertise and personnel to establish and operate a confidential program whereby employees at the Watts Bar Nuclear Plant could express concerns about the safety of the plant and receive feedback on the corrective action taken without fear of losing their jobs. TVA employees had been reporting safety concerns directly to the NRC and to members of Congress as licensing for the plant

approached and indicated they were unwilling to report safety violations through channels at TVA for fear of retaliation. After competitive bidding, QTC was given a contract in April 1985 to establish a confidential program for the expression and investigation of employees' safety concerns. (J.A. 1802)[1] This program was called the Employee Response Team (ERT) and operated under specific procedures (J.A. 1764) at the Watts Bar facility. Many more safety concerns were expressed through the ERT program than either QTC or

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[1] References designated "J.A." are to the page or volume number of the Joint Appendix filed with the Sixth Circuit Court of Appeals, an eleven volume document that Petitioner has or will request be certified to this Court. For references to portions of depositions or specific pages of a deposition exhibit, the J.A. reference is to the first page of that exhibit or that witness testimony as it is given in the cross-reference table of the Joint Appendix, but the page numbers after the exhibit number or witnesses name refers to the specific pages of the deposition or exhibit.

TVA had expected and the contract was supplemented as needed to allow for the additional manpower and funds required. (J.A. 1802, 1820, 1822). The plaintiff also entered into a separate contract with TVA to assist TVA in establishing its own agency-wide and TVA-run Employee Concern Program (ECP) as a means to avoid the problems that led to the need for the ERT and that led to so many concerns being expressed at one time. Work under the ECP contract began in November, 1985, but the contract for QTC's services in the ECP program was not signed until January 10, 1986. (J.A. 1876).

The large number of safety concerns being reported at TVA was causing increased scrutiny by the NRC at other nuclear plants around the country and otherwise causing difficulties for defendant Stone and Webster Engineering Company, Inc. and other

contractors who supplied services to "troubled" nuclear plants in the private sector. (J.A. 1341 Sisken pp. 52-55, 58-59, 110-111) In the late summer or early fall of 1985 the defendants embarked on an effort to obtain management control of TVA's nuclear program and plaintiff alleges also entered into a conspiracy to achieve that goal in part to silence the reporting of nuclear safety issues and also to put QTC, and the competitive approach to problem solving at troubled nuclear plants that QTC represented, out of business.

On January 13, 1986, Steven White assumed the duties of the Manager of the Office of Nuclear Power (ONP) pursuant to a series of contracts by and between the defendants in this action and TVA. Under a contract between TVA and defendants Stone & Webster Engineering (SWEC), the services of White and twelve other persons would be

persons would be supplied to SWEC by defendant STEMAR (a corporation owned by Steven White and his wife) with the five persons being White and the four principles of defendant BETA -- William Wegner, Robert Brodsky, William Bass and Murray Miles. STEMAR would also charge SWEC (and ultimately TVA) an additional 10% "administration fee" for all services provided by BETA (J.A. 1952 Ex. 56 I.G. Report pp. 61,84). The contracts under which Steven White assumed the power and authority of the manager of ONP were clearly in violation of the conflict of interest provisions of 18 U.S.C. §208(a) since White was in a position to order services from his own employer (SWEC) and also to receive a 10% fee for every hour of service he ordered from BETA. The violation was one that specifically

impacted QTC. Under the contract for his services White was given the unfettered power to hire and fire any TVA contractor providing services to ONP, and he did fire QTC and give the resulting work to SWEC and BETA to perform.

QTC was notified within days of White's arrival on the scene that TVA no longer needed QTC's services in the ECP program (J.A. 2132) and that QTC's duties in the ERT program were to be reduced dramatically. (J.A. 2064). The elimination of QTC's involvement in the ERT created a gap in the flow of information that required an entirely new approach be developed for concluding the "resolution" of outstanding employee concerns. Although unknown to the public or to QTC at the time, a number of SWEC and BETA personnel were assigned to the "restructuring" of both the ERT and ECP programs immediately

upon their arrival at TVA. (J.A. 1367 Siskin pp. 167-168, 179-180, 197-199; J.A. 1145 Drotleff p. 25; J.A. 986 Brodsky pp. 100-105) All QTC personnel had left the Watts Bar facility entirely by April 1986, and except for completion of contracts entered into before April 1986, QTC has not been able to obtain employment with any other utility since its termination from TVA. (J.A. 163)

Plaintiff originally filed suit in January 1987 in the Circuit Court of Hamilton County, Tennessee, but the case was removed by the diverse defendants pursuant to 28 U.S.C. §1441. (R2 Petition for Removal)[2] Plaintiff has claimed damages against these defendants for

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[2] References indicated as "R" are to the record entry on the docket sheet of the Eastern District of Tennessee. The complete record was never filed with the Court of Appeals because of its bulk and has remained with the District Court Clerk.

tortious interference with plaintiff's contracts with TVA under T.C.A. §47-50-109, for tortious interference with plaintiff's ongoing business relationship with TVA for trade disparagement and, alternatively, for a constitutional tort.

On January 19, 1988, defendants filed a Motion to Dismiss or in the Alternative for Summary Judgment (R 31) asserting for the first time that the defendants were entitled to claim the absolute and qualified immunity of a government official. Defendants' motion was granted on March 27, 1989, and plaintiff has appealed.

While there are specific factual matters that are hotly disputed between plaintiff and defendants there is ample evidence in the record from which reasonable inferences can be drawn to support plaintiff's view of the facts

presented in this action.[3] On the defendants' motion the plaintiff is entitled to have all disputed facts construed in the light most favorable to the plaintiff. The facts of this case, when viewed in a light most favorable to the plaintiff, show a conspiracy between

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[3] Despite difficulties encountered in obtaining discovery from the defendants the record in this case is voluminous, even as narrowed by the Joint Appendix filed in the Court of Appeals. The factual basis for plaintiff's view of this case is set forth in much greater detail with specific citation to the record in Appellants Brief filed in the Court of Appeals at pp. 10-34 wherein the details of events and contracts between plaintiffs and TVA, defendants and TVA and ultimately the conduct of the defendants to the plaintiff is set forth with greater specificity. Space limitations on this Petition do not allow for an extensive review of factual matters, but if the Court wishes more factual detail for a grant of certiorari, the record is available from the Court of Appeals. The issues presented for review may be determined, however, on the assumption that factual matters alleged by the plaintiff can be proved at trial.

the defendants that began in the Fall of 1985 and which had the following goals:

1. to run QTC off from TVA and shut down the ERT program so the problems with nuclear safety issues being found at the Watts Bar facility could be covered up and the NRC would also ease up on inspections at other plants with which the defendants were involved.
2. to put QTC and its competitive approach to problem solving for the industry out of business.
3. to have the nuclear power program at TVA turned over to SWEC to operate through a series of contracts under which SWEC's agents were placed in control of the management decisions to be made in TVA's nuclear program and

who could then contract with SWEC for more services.

Goal 3 was, of course, the most obviously beneficial to defendants, but it was also the means by which goals 1 and 2 could be most effectively achieved.

The arrangement sought under goal 3 was also a violation of 18 U.S.C. §208(a) and the benefits obtained thereunder were a fraud upon the government. But, these defendants also included in their conspirational plans the means of shielding themselves from criminal liability by obtaining specious determinations under 208(b) from the TVA Board of Directors that were obtained by giving false information to the TVA Board. (R. 123 Affidavit of Donna Keene Holt with attachments). The defendants then proceeded to enrich themselves by millions and millions of dollars in contracts with TVA, and at least

some as yet unknown portion of that $189 million in contracts was for work previously performed by QTC, or work required as a direct result of the termination of QTC.

The illegality of the contracts for White's services appears to have led to the resignation of one of the Directors of the Board of TVA[4] and placed the defendants in

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[4] It seems more than coincidence that Director Freeman's resignation on February 13, 1986, coincides with Mr. Sanger's first published memo addressed to the contracts situation that was dated and distributed February 13, 1986, in connection with the request for 208(b) determinations from the Board for high-ranking SWEC officers (with large holdings in SWEC stock and other financial interests in SWEC) that White wanted to place in four more line management positions at TVA. The day after Director Freeman's resignation the two remaining directors issued the requested 208(b) determination. It should also be noted that these documents indicate an outside estimate of the cost of the services TVA expected it would be obtaining from SWEC on personal services contracts (including the contract for White's services) to be around $16 million. The Board's reasoning for the 208(b) determination was that 16 million was minimal

direct conflict with Herbert Sanger, General Counsel for TVA and also chief ethics officer of the agency.[5] The U.S. Comptroller General issued an opinion June 2, 1986, finding that because the terms of the MOU (Memorandum of Understanding) with TVA vested in Mr. White functions normally performed by a government employee, this rendered the contract for his services an improper personal services contract. As stated in the opinion, "TVA may not avoid the statutory salary limitations by contracting out functions normally

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in comparison to SWEC's $2 billion in annual revenues. The $2 billion figure supplied by SWEC proves to be false, however, with actual revenues more in the range of 200-400 million.

[5] The ongoing "chronology" included in the Congressional hearings of September 29/30, 1986, held to investigate the lack of support for ethics officers who report violations, outlines the ongoing dispute over the conflict of interest issue between defendants and Mr. Sanger (J.A. 861) as well as disagreement between defendants and the Office of General Counsel regarding the termination of QTC.

performed by TVA employees, absent a specific Congressional authorization" 486 FPBR 1087 at p. X1 - 492. TVA hired independent counsel to render an opinion. While the "Strauss Report" (J.A. 2153) disagreed with the GAO conclusions on whether a contract arrangement for a line manager was in itself an improper personal services contract, this legal opinion had to concede that the activities of the defendants and their employees fell squarely within the prohibitions of 18 U.S.C. §208 (a). The opinion further states, however, that there was no "violation" of 208(a) by the defendants because the defendants did obtain 208(b) determinations from the TVA Board, and were, therefore, shielded from criminal liabilty despite having acted in a manner clearly prohibited by 208(a). Finally, the Inspector General of TVA also issued a

report (J.A. 1952-2046) concluding that the contract arrangements created a conflict of interest. In the face of this much public acknowledgement that the federal conflict of interest laws were being violated, the defendants "temporarily resigned" their positions at TVA in October 1986 until the contacts were "restructured." White and agents of the other defendants returned to their line management positions with TVA in January 1987. By the time White left TVA in 1988 SWEC had obtained almost 200 million in contracts from TVA.

Under these facts the grant of the sovereign benefit of governmental immunity cannot be justified. For a court to allow immunity under these circumstances would be tantamount to ruling that it is all right to conspire to put someone out of business as long as the conspiracy is successful and you can place one of the conspirators in

the position of authority needed to complete the job -- and, likewise, it is all right to conspire to violate 208(a) as long as the conspiracy is successful, the conspirators avoid criminal prosecution, and the only one objecting is not the government, but only some victim directly affected by the unlawful acts prohibited by 208(a). To allow a grant of immunity to stand in this case is also to ignore a very well-established body of case law and the previous decisions of this Court as to the criterion to be use for determining when a government contractor may or may not claim governmental immunity.

I.

THE DEFENDANTS ARE NOT ENTITLED TO CLAIM THE IMMUNITY FASHIONED FOR THE PROTECTION OF CIVIL SERVANTS

A. The status of Steven White as an independent contractor cannot be ignored simply because he was allowed to "act like" a federal employee.

The lower courts erred in treating defendant White as though he were a federal employee without examining the facts of this case in light of the applicable law. Mr. White was not a federal employee and went to great lengths to establish that fact to avoid any ramifications to the federal pay cap on the $29,600.00 per month payment ($355,200 per year) he received for his services as the Manager of ONP.

Neither did Mr. White become a "federal employee" simply by assuming his position on January 13. Mr. White has gone to great lengths to establish that he is an Independent Contractor and not a federal

employee of any kind. As set out in the January 7, 1987 contract between TVA and STEMAR (J.A. 1937) it was specified that STEMAR is an independent contractor and that nothing in the contracts shall be deemed to create an employer-employee or agent-principal relationship between TVA and STEMAR. The verbal assurances White demanded at the time he entered the January 1987 contract were included as specific written provisions in the "restructured" contracts that were signed in 1987.

The 1987 contract demands delivery of a legal opinion from TVA counsel to the effect that providing Mr. White's services as Senior Manager "...shall not result in the Senior Manager's being a 'regular officer or employee' of TVA within the meaning of 16 U.S.C. §831b or a 'special Government employee' within the meaning of 18 U.S.C. §202." The contract also demands

delivery of an advisory opinion from the Department of Navy Judge Advocate General confirming that the compensation restriction set forth in the Dual Compensation Act (5 U.S.C. §5532 et seq) does not apply to Mr. White.

Mr. White was most decidedly not a federal employee. The lower courts erroneously assumed that only the employment function was controlling and that White's employment status has no bearing on the issues. In all of the cases relied on by the trial court for granting immunity, however, the individual defendants were unquestionably federal employees or "special employees." Such is not the case for Mr. White. His status as an independent contractor cannot be ignored nor can the significant body of case law on this issue. White can claim the immunity granted to government employees only if he

can show that he falls into that category of cases in which a public contractor is allowed to share the immunity of the public body with which he has contracted.

The general rule has long been that a public contractor is entitled to share the immunity granted to the public body with which he contracts only if the activity complained of was required by the government, but not when the activity was discretionary with the contractor. See generally, Annot. 9 A.L.R. 3d 382 (1966). Tennessee case law illustrates the general rule. In Trigg v. H.K. Ferguson Co., 209 S.W. 2d 525 (TN. App. 1947), the court did not allow the defendant's claim of immunity for injuries arising from negligent marking of a highway that was under construction by the defendant pursuant to a contract with the Federal Government for construction of a war plant, including necessary roads.

The defendant contended that because the government entity (the Army) approved the plans and specification as designed by the defendants, they should be entitled to immunity for following approved specification. The Court found as dispositive, however, that:

> [n]o agency of the government made or furnished to the defendants any plans or specifications for the highways, or directed their location. Upon the contrary, according to the evidence so far, the highway system was wholly the design of the defendant's engineers, apparently what they conceived to be necessary for a complete plant of the kind they agreed to build. Id. at 530.

The rule is no different for federal contractors. In performing work required for redirecting the Mississippi River, the contractor was held immune from responding in damages to injured property owners because the work done was authorized and directed by the government. Yearsley v. W.A. Ross Const. Co., 309 U.S. 18, 60 S.

Ct. 413, 84 L.Ed. 554 (1940). See also in accord, In re "Agent Orange" Product Liabilty Litigation, 506 F. Supp. 762, 792-94 (E.D.N.Y.), rev'd on other grounds, 635 F.2d 987 (2nd Cir. 1980) cert. denied, 454 U.S. 1128, (1981).

Whether the claim is for damages to property resulting from redirecting highways and rivers or for damages to reputation or business from mis-representations or derogatory statements, the rule is the same. The contractor is entitled to claim immunity only when the actions complained of were required by the government. For instance, in Becker v. Philco, 372 F.2d 771 (4th Cir. 1967), the defendant was immune from the plaintiff's damages action for defamation because the defendant was required under its contract with the government to report any suspected compromise of the security system. As the

Court stated, "...the company has no discretion and is mandatorily ordered to report the suspicion immediately." Id. at 774. In Blum v. Campbell, 355 F. Supp. 1220 (D.C. Md. 1972) the manager of an apartment complex under contract to the FHA was deemed entitled to official immunity from a defamation action because the FHA closely supervised the day-to-day activities of the company and the company simply carried out FHA instructions. The defendants, therefore, "were acting as agents under the direct supervision and control of the FHA and not as independent contractors." Id. at 1224. In Bushman v. Seiler, 755 F. 2d 652 (8th Cir. 1985) the report of a podiatrist consultant for Medicare intermediary was the result of an audit conducted pursuant to 42 C.F.R. §421.200(e) and was intended for internal use only, and, therefore, the defendants

were allowed to claim official immunity to tne plaintiff's libel and slander action. After collecting and reviewing cases on the subject, the court in Group Health, Inc. v. Blue Cross Ass'n., 625 F. Supp.69 (S.D.N.Y. 1985) concluded:

> Turning to the facts of this case, it is apparent that the defendants cannot be considered government officials. The conduct complained of was not undertaken at the instigation and direction of the government. To the contrary, Blue Cross acted wholly on its own, without direction or guidance from HHS. Although 42 C.F.R. §421.5(b) provides that intermediaries act on behalf of HHS, that regulation does not elevate the intermediaries to the status of government officials so that they would be immune for their own tortious conduct. Id. at 78.

Simply acting on behalf of a government entity is not sufficient if the independent contractor is exercising his own discretion with regard to the complained of action. As demonstrated above, it is not just Tennessee state courts that have long made a distinction between a contractor who

exercises discretion and one who is simply carrying out the direction of the government. The United States Supreme Court has also long found the distinction to be one of importance. Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). Whether the contractor exercises any degree of discretion became the point of departure between the majority and the dissent in the latest Supreme Court opinion on the subject. In Boyle v. United Technologies Corp., 487 U.S. 500 (1988) a five to four majority allowed a claim of governmental immunity as a bar to a products liability action based on design defect against the manufacturer of a military helicopter because the United States approved reasonably precise specifications and the equipment conformed to those specifications. The dissent would not have allowed immunity because the manufacturer

was not following minutely the government's own in-house specification, but apparently had some input in the preparation of the manufacturing plans. The dissenters apparently viewed any participation by the contractor in the preparation of the plans as an exercise of discretion that would prohibit the use of the immunity defense. As Justice Brennan stated:

> ...In other words, unlike respondent here, the contractor in Yearsley was following, not formulating, the Government's specifications....Had respondent merely manufactured the CH-53D helicopter, following minutely the Government's own in-house specifications, it would be analogous to the contractor in Yearsley, although still not analytically identical....But respondent's participation in the helicopter's design distinguishes this case from Yearsely, which has never been read to immunize the discretionary acts of those who perform service contracts for the Government. Id at 525
>
> (emphasis added)

Under the tests announced by either the majority or the minority opinions in Boyle,

Steven White would not be entitled to claim governmental immunity in this case.

In the case at bar, these defendants are not in a position to contend that Mr. White's actions were made under the direct supervision and control of any TVA employee. Mr. C.H. Dean was Chairman of the Board of Directors at all times pertinent to this action and it is clear from his testimony that Mr. White was functioning as an independent contractor in every sense of the term. (J.A. 1090 Dean pp. 51-54). With respect to the termination of QTC, Mr. White made the appearance of obtaining approval from the Board but actually acted before any approval was given. (J.A. Dean 1098 pp. 40-41; J.A. 1157 Freeman pp. 41-42).

Mr. White has jealously guarded his status as an independent contractor in any interpretation of his statutes that could

lower the financial rewards he receives for his services. He demanded and got total independence in the management decisions related to the hiring and firing of other contractors at TVA. For Mr. White to now contend that he is entitled to claim the protection against damage awards granted to a public servant under the doctrine of official immunity conveniently ignores his status as an independent contractor. The power demanded by and granted to Mr. White makes him an "independent" contractor in every sense of the term and, under existing Supreme Court authority, he is not entitled to claim the immunities otherwise available to TVA employees.

Defendants shrug off (as apparently have the lower courts) the well-established body of law cited by the plaintiff under which a contractor is allowed to claim the

immunity of the government with which it has contracted by the statement,

> ...the cases QTC cites (at 42) involve not the official immunity defense, but the so-called "Government contractor" defense, which has no relevance here at all. Appellee's Brief at p. 28.

What are these defendants if they are not "Government Contractors?" The services of all these defendants were supplied under Personal Service Contracts between SWEC and TVA that were signed on January 3, 1986. Great care was taken to specify in writing that White was an independent contractor and was not to be considered a federal employee, or even a Special Government employee, for any purpose. The defendants demanded and got payment for White's services several times over the maximum annual pay allowed to any federal employee, including the President of the United

States.[6] The defendants demanded and got for White more power and authority than was generally allowed any federal employee in the position he assumed.[7] White continued to draw his Naval retirement pension throughout his assignment to TVA. The fact that these defendants induced TVA to enter into a contract with terms that allowed White to exercise the discretion of a government official does not change the fact that the defendants were clearly government contractors. This Court has previously ruled in another context that simply because a defendant "acts like" a

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[6] Annual pay of $355,200.00 plus expenses plus a 10% surcharge to SWEC on the services provided to TVA by BETA (as requested by White) at a rate of $127.50 per hour.

[7] This was specifically in the area of control over the NSRS, which had been an independent safety organization reporting directly to the TVA Board and the TVA organization under which QTC operated, as well as with respect to procurement, personnel, support services and related areas.

particular kind of immune person or body does not create an immunity that does not otherwise exist.[8]

It is the fact that TVA contracted out the discretionary function of an agency manager that led the trial court below into an erroneous focus on the "functional analysis" for official immunity without regard to White's status as a government contractor. The trial court's opinion is a discourse on the law of official immunity applicable to a federal employee and fails to reconcile an entire body of well-established case law that gives very clear guidance for when a government contractor

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[8] In Cleavinger v. Saxner, 474 U.S. 193 (1985), for example, the defendants were federal employees and prison officials who served as members of a federal prison's Institution of Discipline Committee that "acted like" a judicial body and therefore, sought the protection of absolute immunity granted to judges, prosecutors and parole boards. This was denied and only qualified immunity granted to the defendants.

can and cannot claim immunity. These defendants wanted the money commanded by a government contractor without the restrictions applicable to federal employees, but they wanted this coupled with the power and authority generally allowed only to a government official. They needed for White to have the authority of a government official to achieve their illegal purposes most efficiently. Now that a victim of defendants illegal actions (not only tortious) seeks redress, these defendants want to further shield their accountability by claiming the rights of a civil servant.

Where is the defendants' case citation to support a grant of immunity to an independent contractor who was not a "special Government employee," and who was given complete discretion in the operation of a department of a government agency with

respect to its dealings with other government contractors? In all of the cases cited by the defendants and relied upon by the trial court the person found to be immune was either an outright federal employee or a "special Government employee" or was an occasional government employee assigned to perform a specific task according to a specific government-established protocol or acted under authority of a statutorily created principle/agent relationship.[9] Where are

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[9] Defendant's references to Vest v. Waring, 565 F. Supp. 674 (N.D. Ga. 1983) (Brief at pp. 26 and 31) appear to indicate the holdings that granted immunity in that case applied to persons who were not clearly federal employees, but this is not the case. Defendants must have overlooked the very clear distinction made between the full-time (NEI) and the part-time (NAEC) federal employees who were granted immunity and the private sector defendants who were not allowed to claim immunity, despite the fact they were paid by the NEI to perform the subject research. The private defendants argued they should also be immune from the Sherman Act because they were "instrumentalities" of the NEI and were

the cites to statutes, regulations and legislative history under which White or any of the other defendants in this case can lay claim to official immunity? TVA's general authority to enter into contracts would not be sufficient. It is the lack of specific congressional authorization that

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"literally the hands and 'arms' used by the NEI to fulfill its research obligations and goals." In that case the trial court rightly concluded:

> A private agency, an organization, an individual or a group of persons can be federal "instrumentalities" only to the extent that there is a clearly expressed Congressional intent to create a "principal/agent" relationship between the government and these private parties. In other words, one cannot call himself an "instrumentality" or "arm" of the government merely because he believes himself to be, or even because he happens to be, fulfilling a legitimate governmental purpose. Rather, the extent to which a private entity can be deemed to be acting on behalf of or in the place of the federal government can be determined only by a careful examination of the relevant federal statutes and regulations, and the available legislative history. Id. at 686.

led the U.S. Comptroller General to find the contracts to be improper.

There are statutory provisions passed by Congress to allow private contractors to act for the government. For example, private contractors are authorized by statute to operate nuclear production facilities and carry out a federal mission, with federal property under the direction and control of the DOE under 42 U.S.C. §§2061(b) and 2013(c). No such statute authorized Steven White to operate the nuclear program at TVA, and without Congressional authority he has no basis for asserting a claim for official immunity.

It is not entirely clear whether immunity would attach in all cases, even when such statutory authority to act for the government exists. In Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) this Court was faced with the issue of whether a

state worker's compensation provision could be enforced against Goodyear for an injury to a worker at a DOE facility operated under contract by Goodyear. The Court recognized that the rule was established in Hancock v. Train, 426 U.S. 167, (1976) that "a federally owned facility performing a federal function is shielded from direct state regulation, even though the federal function is carried out by a private contractor, unless Congress clearly authorizes such regulation" 108 S. Ct. at 1710. But immediately thereafter the Court states:

> In this case, however, we are not presented with a direct state regulation of the operation of the Portsmouth facility. Rather, the case involves the imposition of a supplemental award of workers' compensation chargeable against Goodyear, for an injury caused by Goodyear's failure to comply with a state safety regulation. Appellant and the Solicitor General argue that the application of the Ohio additional award provision is nonetheless

> tantamount to a regulation of the Portsmouth facility and thus invalid under the Supremacy clause. We need not decide this issue, however, for we conclude...[that Congress has authorized]...application of the provision to workers at the Portsmouth facility. Id. (emphasis added)

This language indicates this Court's recognition that a private contractor's accountability to an injured party under state law is quite clearly a separate issue from the supremacy clause that prevents a state from attempting to regulate the manner in which a federal function is carried out. The court clearly recognized the distinction, but did not have to decide the issue to resolve the controversy of the case presented.

Whether the issue is immunity from tort liabilty as in Boyle v. United Technology, or immunity from anti-trust liability as in Vest v. Waring, or immunity from enforcement of state workers

compensation provisions as in Goodyear v. Miller, the fact that a private contractor is doing work for the government is not in and of itself sufficient to give that contractor immunity from a civil action. Simply because TVA gave Steven White the authority to act like a government official does not mean this Court has to grant him an immunity that is clearly not available to government contractors under well-established principles of law.[10]

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[10] TVA "cannot manufacture immunity for its employees [or contractors] by agreeing to indemnify them." Spruytle v. Walkers, 753 F.2d 498, 512 n. 6 (6th Cir. 1985). See also Brady v. Roosevelt Steamship Co., 317 U.S. 575 (1943). Are these defendants to be allowed to manufacture official immunity for themselves without legal authorization simply by inducing a three-member Board of Directors for TVA to enter into a Memorandum of Understanding that allows White to "act like" a federal employee?

B. Even if White were allowed some form of immunity, this should not extend to other defendant's nor shield all of the defendnats from liability for a wrongful conspiracy that began before White assumed any duties at TVA.

Even if the Court were to allow White immunity for actions he took once he assumed the position of manager of ONP at TVA, this immunity cannot be stretched backward to cover all the defendants from liability for the conspiracy that began before White assumed his duties. The trial court was in error to reject the evidence in this record that support QTC's contention that two conspiracies were begun in the early fall, one of which was to put QTC out of business at TVA and hopefully for good.[11] It is also reasonable to infer

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[11] Reasonable men may certainly differ with Judge Edgar's assessment of the weight of the evidence on this issue, even based only upon the circumstantial evidence already available in this record. There is certainly sufficient circumstantial evidence from which it may be inferred that a hidden agenda behind

that the process of interference was begun prior to January 13, 1986 and, indeed, we have Mr. Wegner stating to TVA counsel Bill Mason on January 3, 1986, that the defendants have a problem with "Qual Tech." and need to terminate that contract (J.A. 157). Mr. Wegner's statement to a DOL investigator to the effect that "QTC was a cancer that had to be dealt with" (Depo. Ex. 19) is evidence of the attitude of the defendants towards QTC and the intent to cut QTC out of TVA, even if the statement itself is held not to be actionable. And, although he now characterizes the quote with a different meaning, Mr. White does acknowledge his statement to the press that

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the defendant's insistence on White having management control over the NSRS and over the hiring and firing of all contractors was the defendant's plan to get rid of QTC. Evidence supporting plaintiff's contentions is specifically referenced in Appellant's Brief filed in the Court of Appeals at pp. 30-34.

"we made a conscious decision while we were in the contract negotiations" to phase QTC out (J.A. 1569 White pp. 166-171; J.A. 1745).

Even if White were allowed some type of immunity, this does not immunize defendant SWEC or defendant BETA for the tortious activity carried out by their other agents. It appears that the conspiracy was initially formulated by BETA and SWEC principals, agents and employees who later enlisted White into the conspiracy. White was not the only agent acting for the defendants, he was simply the one defendants were successful in placing in a position from which their goals could be effectuated. Surely this Court will not accept a contention that all the SWEC and BETA agents have official immunity simply because the defendants were successful in having the death blows to QTC

struck through the use of White acting as a TVA manager. Just because one member of a conspiracy may have immunity does not prevent the other conspirators from being held liable. It was clearly error for the trial court to dismiss the plaintiff's claims against the other defendants, even if White were accorded some form of immunity. Dennis v. Sparks, 449 U.S. 24, 28 101 S.Ct. 183, 186, 66 L.Ed 185 (1980). Macko v. Bryon, 641 F.2d 447, 449-50 (6th Cir. 1981); Hall v. United States, 704 F.2d 246, 252 (6th Cir. 1983).

II.

A GOVERNMENT CONTRACTOR WHO IS PERFORMING DISCRETIONARY ACTS THAT ARE IN VIOLATION OF 18 U.S.C. §208(a) SHOULD NOT BE ALLOWED TO CLAIM IMMUNITY WHEN THE ACTS COMPLAINED OF HAVE A DIRECT NEXUS TO THE SPECIFIC ACTS THAT VIOLATE §208(a)

Even if TVA can bestow the mantle of official immunity on White simply by allowing him to exercise governmental

power, that immunity surely cannot be stretched to provide cover to all the defendants nor can it immunize illegal acts. While "bad" motives do not defeat official immunity as long as the action complained of was within the outer parameter of the official's duties, illegal actions are always outside the authority of a government official. White's motives were more than simply "bad" they were illegal in that QTC was fired and the resulting work was given out to the other defendants in violation of 18 U.S.C. §208(a). The lower court erred in granting immunity to the defendants without regard to the illegality of the contracts under which White, and through him the other defendants, claim entitlement to official immunity. The lower court assumed the employment status of White was irrelevant and went right into the "functional

analysis" described. There is a presupposition by the Supreme Court, however, as stated in Forrester v. White , 484 U.S. 219 (1988) that the Court is examining the nature of "functions with which a particular official... has been lawfully entrusted." Id. at 5630 The function of firing QTC and hiring SWEC and BETA personnel to replace the QTC program was not a function "lawfully entrusted" to White because this is the very action that violates 18 U.S.C. §208(a).

The illegality of White's contractual arrangement specifically impacts this plaintiff as it may not have anyone else at TVA. QTC was fired and the work was given to the other defendants, and White (as STEMAR) even received a 10% surcharge for every hour Mr. Brodsky charged in January 1986 for the time he spent developing the program plan that defendants came up with

to replace QTC, including the time spent supervising the preparation of the letter reducing QTC's duties at TVA. (J.A. 976 Brodsky pp. 187, 399; J.A. C.Mason pp.46, 54,61; J.A. 1109 Denise I. pp. 81-82) There is a very direct connection between White's conflict-of-interest and the injury done to the plaintiff.

In United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961) this Court ruled that a contract entered into in violation of the conflict of interest statute is void and unenforceable as matter of public policy, even if the party seeking enforcement of the contract ostensibly appears entirely innocent. Yet, here, the Trial Court has allowed these defendants a claim of governmental immunity when the very contract terms under which White is given the power to fire QTC and hire defendants SWEC and BETA to do the work

instead is in direct contravention of 18 U.S.C. §208(a).

The sound reasons for the prohibition against serving two masters is clearly illustrated in this case. Was White serving his master SWEC or his master TVA when he took action to suddenly disrupt an ongoing program that had been approved by the NRC without having an alternative program in place? Which master was he serving when he terminated QTC and the ERT program and gave many hours of contract work to the other defendants (and a percentage to himself as well for BETA hours) to devise a <u>new</u> program for completion of the Watts Bar concerns and also to give advisory support on the ECP program? Which master was he serving when the contracts between SWEC and TVA for support services to ONP grew from the 16 million maximum estimated in early January

1986 to the almost $200 million in contracts in effect by the time Mr. White left TVA in October 1988?

The defendants have thus far retained the financial benefit of their illegal contracts. To then also allow the defendants the added benefit of granting them the immunity of government officials on top of all their illegal profits makes a mockery of the conflict-of-interest laws, the federal pay cap statutes and the rights of other government contractors.

III.

THE LOWER COURT DEPARTED FROM ESTABLISHED PRECEDENT BY GRANTING QUALIFIED IMMUNITY TO ALL DEFENDANTS WHEN THERE IS EVIDENCE THE DEFENDANTS TERMINATED PLAINTIFF'S EMPLOYMENT FOR PRETEXTUAL REASONS AND BY A METHOD OF PUBLICLY DISSEMINATING FALSE INFORMATION ABOUT THE PLAINTIFF IN CONNECTION WITH THE TERMINATION FROM GOVERNMENT EMPLOYMENT THAT HAS RESULTED IN INJURY TO THE PLAINTIFF?

It is well-established that a public official has only a qualified immunity against a claim under Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). The test by which an official's conduct is to be measured to determine whether the qualified immunity exists for the acts complained of was modified and re-established in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Under the Harlow test, the actions complained of are examined to determine whether a clearly established right has been violated, and if the right was clearly established, the defense of qualified immunity fails. The

defendant's good faith belief that his actions were lawful is irrelevant under Harlow, and the existence of the qualified immunity is purely a legal question to be determined by the trial court prior to trial. Donta v. Hooper, 774 F.2d 716 (6th Cir. 1985).

In reviewing the record as a whole, it is clear that the Trial Court erred in granting qualified immunity to all defendants on plaintiff's Constitutional tort claim. As the Trial Court stated, plaintiff's "property" interest extended to those services actually requested by TVA (Memorandum Opinion, Appendix at p. 50). What the Trial Court failed to appreciate, however, was that the implementation and operation of the ERT program as delineated in Procedure 0307 (J.A. 1764) had already been requested by TVA and investigations had already been assigned by NSRS to QTC

when the defendant cut the whole program short and stopped QTC from performing any further investigations (other than certain I&H complaints) and the entire process of feedback to the employees that had already been requested and was part of the written procedures of the program was ended. (J.A. 1424 Thero pp. 338-339). The ERT was an established program with clearly delineated services already being performed and an established measure for when those services were considered completed. Also, with the ECP contract, services had already been requested and a schedule into the future established by TVA when defendants suddenly cut QTC out of that program as well. (J.A. 1417 Thero p. 291). Plaintiff, therefore, does have evidence of violation of a property right in that defendants terminated QTC's completion of already-requested services under both contracts.

The violation of plaintiffs protected liberty interests by defendants' pretextual firing of QTC and the public dissemination of false information in connection with the termination from public employment is even more obvious.

In Wisconsin v. Constantineau, 400 U.S. 422 (1971) the Supreme Court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," constitutional protections are required. Id. at 437. In discussing this and other cases the Supreme Court later clarified in Paul v. Davis, 424 U.S. 693 (1976) that an injury to reputation alone, apart from some more tangible interests such as loss of employment, does not implicate any protected liberty or property interests. From Paul v. Davis came the "stigma plus" test for determining the existence of a

protected liberty interest and reaffirmation that defamation by a public official in connection with a termination of employment is an injury to a constitutionally protected liberty interest.

The lower court properly recognized that the test applied in the Sixth Court for determining whether a challenged termination results in a violation of plaintiff's liberty interest is whether the challenged action involves "the voluntary public dissemination of false information in the course of a decision to terminate...employment" quoting from Burkhart v. Randles, 764 F.2d 1196, 1201 (6th Cir. 1985) and also citing Kendall v. Board of Ed. of Memphis City Sch., 627 F.2d 15 (6th Cir. 1980). (Memorandum, Opinion Appendix at p. 60) Then, however, the Court failed to follow precedent and

instead commenced a review of cases from other Circuits to examine just how slanderous the false information has to be to constitute a violation of plaintiff's liberty interest. The lower court has ignored its own established authority. For instance, in Windsor v. The Tennessean, 719 F.2d 155 (6th Cir. 1983) the Court found no protected property interest because the plaintiff had no legal entitlement to continued employment. The Court also ruled that no liberty interest was shown in that case, but in doing so stated:

> ...Such an interest could arise if false reasons for the discharge were publicly disseminated, thus stigmatizing Windsor and foreclosing other employment opportunities...Windsor does not allege, however, that the reasons for the discharge were publicly disclosed. Id. at 159.

The evidence in the record as a whole most certainly supports plaintiff's claim of a violation of a liberty interest. Plaintiff

has produced ample evidence that the public charges against it by White were false. Plaintiffs have also produced specific evidence that the damage to plaintiff's reputation resulting from the defendants' action in publicly disseminating false information in the course of QTC's termination from TVA has prevented QTC from obtaining further employment. The trial court discounted the weight of Mrs. Garde's affidavit on this issue, but apparently overlooked paragraph 14 of Mr. Theoro's affidavit of March 11, 1988 (JA 163). Plaintiff has produced evidence that QTC has been unable to obtain any new jobs since leaving TVA despite diligent efforts, and also evidence of specific rejection because of the events at TVA and the reputation defendants have fashioned for QTC. (J.A. 163; J.A. 155)

The Court has apparently overlooked the evidence that QTC's termination was entirely pretextual in nature and the false reasons publicly disseminated by the defendants were given out with the intention of discrediting QTC's endeavors at TVA as well as QTC's competitive approach for assisting nuclear plants in the identification of potential safety problems. There is direct evidence as well as inferences that may certainly be drawn that the defendants wanted to discredit QTC and disrupt the ERT program for their own business purposes and also so that they could minimize the safety problems at TVA that were coming to light through the ERT program. The defendants needed to shut the QTC program down so they could cover up the extent of the safety problems at TVA and get the nuclear power program up and

running again.[12] They also needed to shut down the flow of information from TVA to the NRC that was coming through the ERT program at Watts Bar because this was causing "problems" of heightened inspections by the NRC at other nuclear plants where defendants were working with utilities in the private sector.

Defendants certainly cannot say they were unaware that firing QTC to silence the flow of information and the reporting of nuclear safety issues was a violation of a known right in view of 42 U.S.C. §5851(a), a "whistle-blowers" statute that protects

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[12] Indeed in March 1986 Steven White wrote a letter to the NRC assuring the regulatory agency that there had been no pervasive breakdown in TVA's quality assurance program and made subsequent representations to the NRC that reported safety concerns had been greatly exaggerated. This led to an investigation by the NRC of what is referred to as White's "material false statements" that resulted in a citation being issued to TVA because of the material false statements.

persons who report nuclear safety concerns or violations.

Surely the combined effects of pretextual firing from government employment that was intended to punish the plaintiff and silence the reporting of nuclear safety issues to the NRC, that is also accompanied by the deliberate dissemination of false statements in connection with the termination from public employment that has so stigmatized QTC as to put the plaintiff out of business is more than enough to create a liberty interest in QTC that was violated by the defendants.

CONCLUSION

While the situation of a government agency contracting out a line management position may be an unusual occurrence, it is one that can recur and the chances for abuse are great. This is of particular

concern with respect to TVA (an agency that has long bemoaned the restrictions presented by the federal pay cap) since defense counsel are themselves members of the TVA Office of General Counsel and persist in the position that the contractual arrangements with the defendants in this case were entirely in order. They seem to have difficulty comprehending the existence of a conflict-of-interest under 208(a). (See Appellee's Brief at p. 32) The position apparently taken by TVA, as well as the defendants in this case, is that a government agency can delegate the right to violate 18 U.S.C. §208(a) to a private party by simply making a specious ruling under 208(b) and anyone harmed by action that would otherwise be prohibited by 208(a) has no standing to complain since 208(a) is a criminal statue that is meant only to protect the

government. Additionally, the defendants have taken the position that as long as the TVA Board grants the authority, government contractors can exercise the discretion of the government without specific authority from Congress, and then shield their actions from accountability by claiming official immunity from civil liabilty to one who is harmed as a result of their discretionary and wrongful actions. Such a disregard for the power reserved to Congress, for federal statutes and for the case law established by this Court cannot be allowed to stand to the detriment of a citizen injured by the actions of other citizens.

Respectfully submitted,

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(2)

No. 90-1184

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

QUALITY TECHNOLOGY COMPANY, PETITIONER

v.

STONE & WEBSTER ENGINEERING COMPANY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tennessee Valley Authority's Manager of Nuclear Power, who served as a "loaned employee" pursuant to a contract with a private consulting firm, is entitled to absolute immunity from suit under state tort law for discretionary actions within the scope of his duties.

2. Whether the courts below properly granted summary judgment on petitioner's *Bivens* claims.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 92-93) is unreported, but the decision is noted at 909 F.2d 1484. The opinions of the district court (Pet. App. 3-91) are reported at 745 F. Supp. 1331.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 1990. A petition for rehearing was denied on October 19, 1990. Pet. App. 94-95. The petition for a writ of certiorari was filed on January 17,

1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1 a. In April 1985, petitioner entered into a one-year contract with the Tennessee Valley Authority to provide services in connection with the development of a program to identify employee safety concerns at TVA's Watts Bar Nuclear Plant.[1] Petitioner undertook to interview all employees at the Watts Bar Plant and develop procedures for gathering and processing confidential employee interviews. The contract provided for petitioner to render services "when and as requested" by TVA. The original contract provided that the fee for petitioner's services would not exceed $3.6 million; that amount was later increased to $5.6 million. Pet. App. 4-6; Gov't C.A. Br. 9-10.

Petitioner's interviews resulted in a large backlog of pending employee concerns. At TVA's request, petitioner submitted a proposal to modify its contract to give petitioner additional responsibility for investigating the pending concerns. Petitioner proposed to increase its maximum fee to TVA by some $11.5 million. TVA concluded that petitioner's proposal did not suit the agency's needs, but proposed to continue petitioner's involvement and to increase the amount of the contract, first by $750,000 and then by $1.5 million. Petitioner and TVA were unable to reach agreement on a contract modification. Petitioner ceased work when the full amount authorized under

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[1] TVA is a government agency, created by the Tennessee Valley Authority Act of 1933 (TVA Act), 16 U.S.C. 831-831dd, that, among other things, supplies electricity to large areas of Tennessee and adjoining States. The TVA is "an instrumentality of the United States." *Tennessee Elec. Power Co.* v. *TVA*, 306 U.S. 118, 134 (1939).

the contract had been expended. Pet. App. 6-8; Gov't C.A. Br. 10, 18-20.

In January 1986, TVA and petitioner entered into a second contract, for a maximum of $635,000, under which petitioner agreed to provide services "when and as requested" in connection with the development of an in-house employee concerns program that would receive, investigate, and resolve employee concerns raised throughout TVA beginning in February 1986. TVA subsequently determined that it would not need any services from petitioner under this contract after January 31, 1986, and it so informed petitioner. Pet. App. 7; Gov't C.A. Br. 10-11, 19.

b. In 1985, TVA's nuclear power program faced serious difficulties. TVA had shut down its operating nuclear power generators at Sequoyah and Browns Ferry. The agency had not applied for a license to operate the Watts Bar Plant, even though that facility was essentially complete. In response to this situation, TVA hired respondent Steven A. White, a retired admiral with extensive experience in the Navy's nuclear power program, to serve as the agency's Manager of Nuclear Power. White's services were provided to TVA pursuant to a contract between TVA and respondent Stone & Webster Engineering Corporation, an engineering consulting firm. Stone & Webster, in turn, contracted with respondents Stemar Corporation (a consulting company whose only employees are Mr. White and his wife) and Beta, Inc. (another consulting firm) to provide the services of White and up to 12 additional individuals to TVA as "loaned employees." Pet. App. 8-9; Gov't C.A. Br. 11-15.

White began work for TVA on January 13, 1986. His duties and responsibilities were defined by a memorandum of understanding between TVA's Board of

Directors and White. The memorandum provided that White had "direct authority for the management, control and supervision of TVA's entire nuclear power program." Pet. App. 30 (quoting memorandum). As Manager of Nuclear Power, White was "TVA's principal spokesman on public information matters" and the "primary line manager with responsibility to determine the need for * * * all * * * services required for the nuclear power program," and was "authorized to take any other actions that he deem[ed] necessary or appropriate to improve the effectiveness of the overall management of TVA's nuclear power program." *Id.* at 30-33 (quoting memorandum).[2]

2. In January 1987, petitioner sued respondents in state court. Petitioner's complaint alleged that respondents had (1) conspired among themselves to induce TVA to breach its contracts with petitioner; (2) tortiously interfered with petitioner's business relationship with TVA; and (3) disparaged petitioner's business reputation. Pet. App. 10. Petitioner's disparagement claim was based on allegations that White told a Congressman that petitioner "cost too much, was too slow, and didn't meet White's standards of quality," and that petitioner was "lazy, slow, and their reports are the worst I have ever read." *Id.* at 62. Petitioner also alleged that one of the principals of respondent Beta told a Department of Labor investigator that petitioner "was a cancer to be dealt with." *Ibid.* In addition to its state law claims, petitioner asserted a *Bivens* claim alleging that respond-

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[2] Admiral White left his position as TVA's Manager of Nuclear Power after the agency successfully returned both of the Sequoyah nuclear generating units to operation. Gov't C.A. Br. 15 n.6.

ents, while exercising "governmental responsibilities," had deprived petitioner of protected property and liberty interests without due process of law. Pet. App. 10-11; Gov't C.A. Br. 20-22.

a. Respondents removed the case to the United States District Court for the Eastern District of Tennessee. Following discovery, the district court granted respondents' motion for summary judgment on all claims. Pet. App. 1-91.

As to petitioner's state law claims, the district court held (Pet. App. 19-46) that White was entitled to absolute immunity under *Westfall* v. *Erwin*, 484 U.S. 292 (1988), and *Barr* v. *Matteo*, 360 U.S. 564 (1959). The court rejected petitioner's argument that White was "not a federal employee of the kind entitled to immunity from suit." Pet. App. 20. The court observed that the contractual relationship among TVA, Stone & Webster, and Stemar "reveal[s] an intent to side-step regular hiring practices and the related * * * limitations on salary and compensation." *Id.* at 20-21. But the court concluded that White's status as a loaned employee did not affect his entitlement to immunity. Because official immunity is "an expression of a policy designed to aid in the effective functioning of government," *Barr*, 360 U.S. at 572-573, the court said that it is the nature of the defendant's duties, rather than his status, that determines immunity. Pet. App. 25-26 (citing *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985)).

Applying this "functional inquiry" (Pet. App. 27), the district court held that petitioner's contractual relationship with TVA was within the scope of White's duties as Manager of Nuclear Power. *Id.* at 39. White had "responsibility for the operation of TVA's entire nuclear program, answering only to the General Manager and the Board of Directors." *Id.* at

37. "[I]dentifying and addressing the safety concerns expressed by TVA employees was a high priority task, crucial to returning the TVA nuclear program to operating status." *Id.* at 38. The court, observing that petitioners "have failed to challenge the [respondents'] claims that their actions were discretionary," concluded that White's alleged actions "were in fact discretionary." *Id.* at 44. In particular, White's allegedly defamatory statements were within his discretion as TVA's principal spokesman on nuclear power matters.[3] *Id.* at 43. Accordingly, the court held that White was entitled to absolute immunity from liability on petitioner's state law tort claims. The court proceeded to dismiss the state law claims against the corporate respondents because, under Tennessee law, there is no vicarious liability unless the agent is subject to individual liability. Pet. App. 45-46 (citing authorities).[4]

The court also granted summary judgment for respondents on petitioner's constitutional tort claims. Pet. App. 46-47. Because petitioner's contracts with TVA provided that petitioner would render services only "when and as requested by TVA," the court was "hard pressed to find a property interest created by the * * * contract." *Id.* at 49. The court also rejected petitioner's alternative argument that it suffered deprivation of a protected liberty interest in its reputation. The court noted that injury to

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[3] The court held that a statement allegedly made by a principal of respondent Beta, Inc. to an investigator for the Department of Labor was privileged under 42 U.S.C. 5851. See Pet. App. 73.

[4] In addition, the court observed that petitioner's claim for trade disparagement appeared to be barred by the statute of limitations. Pet. App. 16 & n.1.

reputation, without more, is not protected under the Due Process Clause. See *Paul* v. *Davis*, 424 U.S. 693 (1976). Respondents' alleged statements, which concerned the adequacy of petitioner's performance rather than its honesty or morality, did not carry the kind of stigma that might give rise to a procedural due process claim. Moreover, the court concluded that an affidavit submitted by petitioner failed to show that it was foreclosed from obtaining other employment as a result of the alleged statements. Pet. App. 56. In any event, the court held, respondent White was entitled to qualified immunity for his statements, because they violated no clearly established right of petitioner. Pet. App. 70-71.

b. The district court denied petitioner's motion to alter or amend the judgment. Pet. App. 79-91. In response to petitioner's contention that White "was not 'lawfully entrusted' with the requisite discretionary authority necessary to assert the protection of official immunity," *id.* at 83, the court said that "it would appear that White was in fact 'lawfully entrusted' with the authority to perform the discretionary functions relating to [petitioner]." *Id.* at 83-84. The court found nothing in the record to show that the arrangement between TVA and respondents was improper under 18 U.S.C. 208(a). And even if the arrangement between TVA and White was improper, White and TVA nevertheless shared "the same interest in getting the Government's work done." Pet. App. 84 (quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 505 (1988)). The court also rejected petitioner's contention that summary judgment was inappropriate in light of its allegation of a conspiracy to "obtain control of TVA's nuclear program." The court noted that respondents' motives

are irrelevant to White's entitlement to absolute immunity. Pet. App. 89-90 (citing *Barr* v. *Matteo*, 360 U.S. at 575).

3. The court of appeals affirmed for the reasons stated by the district court. Pet. App. 92-93.

ARGUMENT

As petitioner recognizes (Pet. 59), this case concerns an "unusual" employment arrangement adopted by TVA in response to a crisis in its nuclear power program. Because this unusual situation is unlikely to recur, and because the decision of the courts below is correct and does not conflict with any decision of this Court or any other court of appeals, further review is not warranted.

1. a. In *Westfall* v. *Erwin*, 484 U.S. 292, 300 (1988), this Court held that federal officials are absolutely immune from tort liability under state law for conduct that is "within the outer perimeter of an official's duties and is discretionary in nature." The reason for this immunity is that

> officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. *Matteo*, 360 U.S. 564, 571 (1959). The doctrine of official immunity is fully applicable to TVA officials. See *Queen* v. *TVA*, 508 F. Supp. 532 (E.D. Tenn. 1980), aff'd, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Walters* v. *TVA*, 503

F. Supp. 111 (E.D. Tenn. 1980), aff'd, 698 F.2d 1225 (6th Cir.) (Table), cert. denied, 459 U.S. 823 (1982).[5]

Petitioner does not dispute the lower courts' conclusion that respondent White acted within the scope of his duties as TVA's Manager of Nuclear Power, or that his alleged actions were discretionary in nature. The courts below are plainly correct on these points. As Manager of Nuclear Power, White had "direct authority for the management, control and supervision of TVA's entire nuclear power program." Pet. App. 30. His broad duties included, among other things, acting as TVA's "principal spokesman on public information matters, * * * [and as] the primary line manager with responsibility to determine the need for * * * services required for the nuclear power program." *Id.* at 31-32.

Petitioner asserts (Pet. 19-40), however, that White was an independent contractor, and that independent contractors are not entitled to official immunity for conduct that is discretionary in nature. As an initial matter, petitioner errs in its blanket

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[5] In response to this Court's decision in *Westfall* v. *Erwin*, *supra*, Congress passed legislation providing that federal employees are absolutely immune from suit under state law for acts within the scope of their employment. See Federal Employees Liability Reform and Tort Compensation Act of 1988 (Reform Act), Pub. L. No. 100-694, 102 Stat. 4563. The Reform Act applies to all claims that were pending on November 18, 1988. See § 8, 102 Stat. 4565-4566. It also applies to employees of the TVA. *See* § 9, 102 Stat. 4566-4567; 16 U.S.C. 831c-2. Thus, to the extent that White is an employee under the Reform Act, he is entitled to absolute immunity from suit under state law. And since petitioner does not dispute that White's actions were discretionary in nature, White is also entitled to absolute immunity under this Court's decision in *Westfall*.

assertion that independent contractors who exercise discretion are never entitled to immunity. See, *e.g.*, *Boyle* v. *United Technologies Corp.*, 487 U.S. at 512-513 (contractor may be immune even if it exercised some discretion in design of military equipment); *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) (landowner barred from suing government contractor on claim that construction of a dam eroded land). See also *Bushman* v. *Seiler*, 755 F.2d 653 (8th Cir. 1985) (consultant to an insurance company that served as a Medicare carrier deemed a government official for immunity purposes). In any event, petitioner has mischaracterized the nature of White's relationship to TVA. As Manager of Nuclear Power, White was a "primary line manager" who reported "directly to the General Manager and Board of Directors" of TVA. Pet. App. 32 (quoting Memorandum of Understanding). Consequently, White was acting in the capacity of an employee of TVA.[6]

Petitioner asserts that a contract between TVA and respondent Stemar Corporation entered into on January 7, 1987 (nearly a year after the actions alleged

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[6] See generally Restatement (Second) of Agency § 2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."); *id.* § 2(3) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."). Cf. *United States* v. *Orleans*, 425 U.S. 807, 814 (1976) (under Federal Tort Claims Act, critical element in distinguishing federal agency from contractor is "power of the Federal government 'to control the detailed physical performance of the contractor.'" (quoting *Logue* v. *United States*, 412 U.S. 521, 528 (1973)).

in petitioner's complaint) demonstrates that White "has gone to great lengths to establish that he is an Independent Contractor and not a federal employee." Pet. 19-20. But as petitioner itself notes (*id.* at 20), the contract provided only that *Stemar* was an independent contractor, and that *Stemar* should not be deemed to be an agent or employee of TVA. The contract did not provide that *White*, as TVA's Manager of Nuclear Power, would not be an agent or employee of TVA. On the contrary, the contract expressly provided that White would comply with 18 U.S.C. 208(a), a statute that applies only to "an officer or employee of the executive branch of the United States Government [or] any independent agency of the United States." Similarly, TVA's memorandum of understanding with White subjected him to "all applicable TVA rules and procedures covering TVA employees." Pet. App. 33.[7]

Petitioner also relies (Pet. 15-16) on an opinion of the Comptroller General concluding that TVA's contractual arrangement for White's services was an improper contract for personal services. 86 Fed. Pay & Ben. Rep. (LRP Pub.) ¶ 1087 (June 2, 1986). As petitioner recognizes (Pet. 16), the Comptroller General's opinion is not conclusive on this issue, and an

[7] It is true that TVA's relationship with White was designed to avoid the salary cap for a "regular officer or employee of [TVA]" established by 16 U.S.C. 831b, as well as the restrictions on dual pay established by 5 U.S.C. 5531-5532. In addition, White did not fit the definition of a "special Government employee" within the meaning of 18 U.S.C. 202, because his services were obtained for more than 130 days during a 365-day period. Although TVA's arrangement with White may not have fit a standard federal employment category, there is no doubt that he reported to TVA's General Manager and Board of Directors, which had the right to control his official actions.

independent counsel has concluded that TVA's contractual relationship with White was proper.[8] C.A. App. 2153-2254. In any event, the Comptroller General's opinion does not support petitioner's position. That opinion recognizes that TVA's arrangement with White did "not involve the performance of a particular job or task without supervision and control by the Government, but rather involves the management of TVA's nuclear power program," and concludes that "the contractual arrangement between TVA and Mr. White clearly establishes an employer-employee relationship." 86 Fed. Pay & Ben. Rep. at X-86-130.

Petitioner's reliance on this Court's decision in *Boyle* v. *United Technologies Corp.*, *supra*, is misplaced. *Boyle* held that government contractors are immune from suit under state tort law for design defects in military equipment when the government approves "reasonably precise specifications," the equipment conforms to those specifications, and the contractor warns the government of dangers that were known to it but not to the government. 487 U.S. at 512. The Court said that "the first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—*i.e.*, they assure that the design feature in question was considered by a Government

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[8] Congress has granted the TVA exceptionally broad authority to enter into contracts for services. TVA is authorized "subject only to the provisions of the [TVA Act] * * * to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary," and to "determine * * * the * * * contents of its contracts and other business documents except as otherwise provided in the [TVA Act]." 16 U.S.C. 831h(b). See also 16 U.S.C. 831c(g).

officer, and not merely by the contractor itself." *Ibid.* To permit "second-guessing" of discretionary judgments by TVA's Manager of Nuclear Power through state law claims merit no further review. Petitioner sought to be avoided" by the discretionary function exemption of the Federal Tort Claims Act, 28 U.S.C. 2680(a), as well as by the Court's decision in *Boyle*. 487 U.S. at 511.[9]

b. Petitioner's other contentions concerning its state law claims merit no further review. Petitioner claims (Pet. 41-44) to have alleged that respondents engaged in tortious activity before White assumed his duties as Manager of Nuclear Power. But the district court rejected this fact-bound contention, finding that petitioner "alleges its injury to be the direct result of the discretionary actions of Mr. White, while acting in his official capacity." Pet. App. 45. In addition, the court below correctly granted summary judgment in favor of the corporate respondents on petitioner's state law claims. Under Tennessee law, a principal cannot be held vicariously liable unless its agent is subject to liability. See *Stewart* v. *Craig*, 208 Tenn. 212, 217-218, 344 S.W.2d 761, 763 (1961); *Ownby* v. *Kleyhammer*, 194 Tenn. 109, 250 S.W.2d 37 (1952).

2. Petitioner contends (Pet. 44-49) that respondents are not entitled to immunity because White's alleged actions were illegal under 18 U.S.C. 208(a).[10]

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[9] See also note 5, *supra* (immunity under Reform Act).

[10] Section 208(a) provides:

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, [or] of any independent agency of the United States * * * participates personally and substantially as a Government officer or em-

That contention is without merit. The fact that a federal official may be subject to criminal penalties for participating in a matter in which he has a personal interest does not imply that the official is not exercising discretionary authority within the scope of his employment. Moreover, petitioner's allegation of illegality is unfounded. Pursuant to 18 U.S.C. 208(b), the TVA Board determined that White's interest in Stone & Webster was not so substantial as to affect the integrity of the services rendered. See Pet. 60. The Board based its determination on the fact that White would be paid the same amount regardless of whether TVA purchased any other services from Stone & Webster, and on the fact that the TVA Board itself, rather than White, authorized the purchase of services from Stone & Webster.[11]

3. Finally, petitioner renews its contention (Pet. 50-59) that respondent deprived it of constitutionally protected property and liberty interests without due process. That contention warrants no further review. The courts below correctly held that petitioner had no claim that protected property or liberty interests had been infringed, and that White was entitled to quali-

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ployee * * * in a * * * matter in which, to his knowledge, he * * * [or any] organization in which he is serving as officer, director, trustee, partner or employee * * * has a financial interest—shall be fined not more than $10,000, or imprisoned not more than two years, or both.

[11] *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), is of no help to petitioner. In that case, the Court framed the question presented as "whether the Government may disaffirm a contract which is infected by an illegal conflict of interest." *Id.* at 566. The Court did not suggest that any government contract entered into in violation of 18 U.S.C. 208(a) is void even if the government chooses to enforce the contract despite the conflict of interest.

fied immunity because there had been no invasion of any "clearly established" legal rights, Pet. 69 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)).

Petitioner had no legitimate claim of entitlement to continuation of its contracts or to additional payments from TVA. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (property interest entails a "legitimate claim of entitlement" to the claimed benefit). The TVA Act itself certainly did not grant petitioner a right to provide additional services to TVA. See *Inryco, Inc.* v. *TVA*, 471 F. Supp. 59 (E.D. Tenn. 1978); *GF Business Equip. Co.* v. *TVA*, 430 F. Supp. 699 (E.D. Tenn. 1975), aff'd, 556 F.2d 581 (6th Cir. 1977). And petitioner's contracts with TVA provided for petitioner to render services only "when and as requested" by TVA. Pet. App. 49-50. Absent a request by TVA, petitioner had no right to perform any services or receive any payment from TVA. Moreover, all monies authorized under petitioner's principal contract with TVA were in fact expended.

In addition, petitioner failed to state a valid claim for deprivation of a protected liberty interest. Damage to reputation, without more, is not a deprivation of constitutionally protected liberty. See *Paul* v. *Davis*, 424 U.S. 693, 708-712 (1976). A plaintiff asserting an unconstitutional deprivation of a liberty interest in this context must show that government officials not only defamed him, but did so to such an extent as to brand his reputation with a "stigma" that deprived the plaintiff of some affirmative right previously held under state law. *Id.* at 708, 711. Here, the district court found (Pet. App. 65) that "[t]he statements made by White * * * merely reflected White's opinion of the competence and job

performance of [petitioner]." Such statements are not stigmatizing. See, *e.g.*, *Russell* v. *Hodges*, 470 F.2d 212, 215 n.2 (2d Cir. 1972); *Blair* v. *Board of Regents*, 496 F.2d 322, 324 (6th Cir. 1974); *Lake Mich. College Fed'n of Teachers* v. *Lake Mich. Community College*, 518 F.2d 1091, 1097 (6th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *Stretten* v. *Wadsworth Veterans Hosp.*, 537 F.2d 361, 366 (9th Cir. 1976). See also *Munson* v. *Friske*, 754 F.2d 683, 693 (7th Cir. 1985); *Hadley* v. *County of Du Page*, 715 F.2d 1238, 1245 (7th Cir. 1983), cert. denied, 465 U.S. 1006 (1984). Consequently, the courts below properly rejected petitioner's procedural due process claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO._____

UNITED STATES SUPREME COURT
OCTOBER, 1990 TERM

QUALITY TECHNOLOGY COMPANY

Plaintiff-Appellant

VS.

STONE & WEBSTER ENGINEERING COMPANY, INC.; STEMAR CORPORATION; BETA, INC.; and STEVEN A. WHITE

Defendants-Appellees

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

QUALITY TECHNOLOGY COMPANY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIV-1-87-054
STONE & WEBSTER ENGINEERING COMPANY, INC., STEMAR CORPORATION, BETA, INC., and STEVEN A. WHITE,	§	
	§	
Defendants.	§	

ORDER

For the reasons stated in the accompanying memorandum opinion filed herewith and passed this day to the Clerk for filing, the motion of the defendants Stone & Webster Engineering Company, Inc., STEMAR Corproation, Beta, Inc. and Steven A. White for summary judgment (Court File No. 131) as to the claims of the plaintiff Quality Technology Company is GRANTED. This civil action is, therefore, DISMISSED.

SO ORDERED.

ENTER: March 27, 1989

R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

QUALITY TECHNOLOGY COMPANY Plaintiff	§	FILED: 3/27/89
v.	§	CIV-1-87054
STONE & WEBSTER ENGINEERING ET AL Defendant	§	

MEMORANDUM

The defendants in this civil action have filed a motion to dismiss the plaintiff's complaint, or in the alternative, for summary judgment as to those claims therein. (Court File No. 31). In support of their motion, defendants have filed the affidavits of two present, and one former TVA Office of Nuclear Power employees, as well as that of a TVA attorney. (Court File Nos. 32-35). The plaintiffs have responded in opposition to the defendants' motion (Court File No. 86), filing supporting affidavits and deposition exhibits. (Court File Nos. 89-93). This

case was originally filed in the Circuit Court of Hamilton County, Tennessee and removed by the diverse defendants pursuant to 28 U.S.C. §1441 upon their representations that the plaintiff's complaint alleges claims governed by federal law, and that the parties are diverse. 28 U.S.C. §§1331 and 1332. See Court File No. 2.

Factual Background

In 1985, the Tennessee Valley Authority (hereinafter "TVA") hired the plaintiff, Quality Technology Company (hereinafter "QTC"), to perform various contract services specifically related to interviewing TVA employees of the Watts Bar Nuclear Plant pursuant to an employee concern program established by TVA. This program was created in response to the many

complaints the Nuclear Regulatory Commission ("NRC") received from TVA/Watts Bar employees regarding safety violations alleged to have occurred during construction of that nuclear facility. The contract between TVA and QTC, Contract No. TV-66317A (Exhibit 30, Court File No. 92) was entitled "Tennessee Valley Authority Contract for Personal Services," and provided that the contractor, QTC, would perform certain services for TVA "[w]hen and as requested by the Director of TVA's Nuclear Safety Review Staff (NSRS) . . . ." The term of the contract was for one year, beginning on April 26, 1985. As indicated from the contract, those services included generally: conducting interviews of present and former TVA employees at Watts Bar, developing and implementing procedures for gathering and processing employee interviews confidentially, certain

investigatory work necessitated by employed interviews and complaints, and reporting those results to the TVA while maintaining employee confidentiality.

As the TVA/QTC contract and working relationship progressed, QTC made its reports and answered to the TVA Nuclear Safety Review Staff, which in turn reported directly to the TVA Board of Directors. With regard to certain complaints of intimidation and harassment, QTC reported to the TVA Office of the General Counsel. As the employee concerns program developed, the volume of complaints and issues raised in the interviews drastically increased. As a result of the unexpected number of issues and complaints received, TVA and QTC modified the personal services contract to include additional funds and time for the performance of more investigatory services

by QTC, necessitated by those complaints. See Exhibits 31-33.

In late 1985, TVA began to consider the alternative of creating its own internal program for identifying and addressing nuclear employee concerns. In an effort to establish its own program, TVA and QTC entered into a second contract for the services of QTC. This contract, No. TV-68705A, was separate and distinct from the original one-year contract to respond to employee complaints, and provided that QTC was to aid TVA in the development of its own in-house system for dealing with employee safety concerns. During this same period, TVA began to contemplate the need to modify the investigatory functions being performed by QTC under the original contract. In an effort to facilitate the investigation and resolution of the large number of employee safety concerns, the TVA

General Manager proposed a change in the structure of the review program to create a "management review group." It was the purpose of this change to coordinate all pending investigations of safety-related concerns and complete their review within a six-month period. It is QTC's position that it was to be heavily involved in this new program, being assigned new responsibilities for investigating pending employee concerns pursuant to an agreement with TVA's general manager. QTC was asked by TVA's general manager to submit a contract modification proposal incorporating QTC's additional responsibilities, and did so in December of 1985.

It was during the following months of January and February of 1986 that defendant Steven White assumed his duties as Manager of TVA's Office of Nuclear Power pursuant

to a contract between TVA and defendants Stone & Webster Engineering Corp. and Stemar Corp. See Exhibits 49-55, Court File No. 92. White assumed the job of operating TVA's nuclear power program as a "loaned employee" (Exhibit 49), with his responsibilities and authority defined by the "Memorandum of Understanding" between the TVA Board of Directors and White. See Attachment to Exhibit 49, Court File No. 92. It is clear from this document that TVA clothed Steven White with very broad and "direct authority for the management, control and supervision of TVA's entire nuclear power program . . . ." Id. at para. 2. As a result of White assuming control of TVA's nuclear poser program, QTC asserts that drastic changes in the scope of QTC's responsibility under the original contract occurred. It is QTC's treatment by the Manager of the Office of Nuclear Power and

those working directly for him pursuant to contract that gives rise to QTC's claims.

QTC's Claims

In its complaint, QTC alleges four causes of action against these individual and corporate defendants. QTC asserts state law causes of action based on the defendants' alleged inducement of TVA to breach its contract with QTC for continued personal services under contract No. TV-66317A. See T.C.A. §47-50-109. QTC further alleges that the defendants tortiously interfered with QTC's business relationship with the TVA. QTC's third cause of action alleges that the defendants engaged in trade disparagement, an injury alleged to have resulted from certain remarks defendants White and a representative of Beta, Inc. made regarding

QTC's job performance and White's dissatisfaction therewith. This is a claim of defamation under Tennessee law. Lastly, QTC asserts as its fourth cause of action that the defendants' alteration or termination of the TVA/QTC personal services contract resulted in a violation of QTC's Fifth Amendment rights under the Constitution to due process, where the defendants' actions denied QTC a property right in the performance of the contract in bad faith.

Plaintiff also seeds to amend its complaint to add a claim for deprivation of "liberty" interests under the Fifth Amendment. See Court File No. 84. The court has not yet acted on this motion.

Defendants' Motion for Summary Judgment

Defendants' motion seeking dismissal of QTC's case, or in the alternative, summary judgment, will be treated as a motion for summary judgment pursuant to Fed. R. Civ. P. 56(c) due to the parties' and the Court's reliance upon affidavits and documents outside the pleadings. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedures §2713 (1983).

QTC asserts that the defendants failed to timely raise their affirmative defense of official and qualified immunity under Fed. R. Civ. P. 8(c). Professor Wright has stated the general rule that "a failure to plead an affirmative defense results in the waiver of that defense and its exclusion from the case." 5 C. Wright and A. Miller, Federal Practice and Procedure §1278 (1969). However, he goes on to note that some federal courts limit this waiver provision to only those affirmative

defenses noted in Rule 12(h). Id. In this circuit, it has been held "that immunity, whether qualified or absolute, is an affirmative defense which must be affirmatively pleaded; . . . [the] failure to do so can work a waiver of the defense." Kennedy v. City of Cleveland, 797 F.2d 297, 300 (6th Cir. 1986) (emphasis added). However, "[w]here the matter is raised in the trial court in a manner that does not result in unfair surprise, . . . [the] technical failure to comply precisely with Rule 8(c) is not fatal." Allied Chemical Corp. v. Mackay, 695 F.2d 854, 855-56 (5th Cir. 1983), quoted in Lucas v. United States, 807 F.2d 414, 417 (5th Cir. 1986). As noted in Lucas, "the defendant does not waive an affirmative defense if 'he raised the issue at a pragmatically sufficient time, and the plaintiff was not prejudiced

in its ability to respond.'" 807 F.2d at 418, quoting Mackay, 695 F.2d at 856.

As noted by other courts, "liberal pleading rules are equally applicable to the pleading of affirmative defenses." Baker v. City of Detroit, 483 F.Supp. 919, 921 (E.D. Mich. 1979). The key to this analysis is apparently whether, absent asserting immunity as an "affirmative defense" in the pleadings, the parties otherwise had notice of the issue. As Professor Wright notes, "[a]nother highly relevant consideration is whether plaintiff will be taken by surprise by the assertion at trial of a defense not pleaded affirmatively by defendant." C. Wright and A. Miller, Federal Practice and Procedure § 1271 at 315. In this case, the defendants raised in their answer (Court File No. 3) the issue of privilege, designated as defenses. In several of these defenses

defendants assert that their activity and involvement with TVA's federal nuclear power program entitle them to the defense of privilege from liability, making the plaintiff's claims non-actionable. Defendants filed their answer on March 3, 1987. After several months of discovery, the defendants filed their motion for summary judgment (Court File No. 31) asserting official and qualified immunity on January 19, 1988.

QTC has alleged no facts to support the assertion that it has been prejudiced by the defendants' failure to raise as an affirmative defense the issue of immunity. There will be no element of unfair surprise visited on the plaintiff at trial since the issue was raised at a relatively early stage of these proceedings. The Court can assume that some discovery was necessary in order for the defendants to be in a

position to factually and legally appreciate the claims made against them in the complaint. The Court does not find that the timing of the defendants' motion has resulted in any prejudice to QTC or its ability to full respond to the defense of immunity. For these reasons, the Court does not find that the defendants waived their right to assert official or qualified immunity.

The defendants' motion seeks summary judgment on several grounds. With regard to plaintiff's state law claims for trade disparagement, defendants assert that the applicable six-month Tennessee statute of limitations, T.C.A. § 28-3-103, bars plaintiff's claim for commercial defamation.[1] As for the remaining state

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[1] T.C.A. ** 28-3-103 provides: "Actions for slanderous words spoken shall be commenced within six (6) months after the words are

law claims for interference with contract and inducement to breach, defendants claim that absolute official immunity shields them from suit. See Barr v. Matteo, 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335 (1959); Howard v. Lyons, 360 U.S. 593, 3

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uttered." This statute "sets forth a positive and distinct event that triggers the running of the limitations period -- the utterance of the alleged defamatory words." Heller v. Smither, 437 F.Supp. 1, 5 (M.D. Tenn. 1977). Plaintiff filed the instant suit on January 16, 1987, originally in Hamilton County Circuit Court. It was Subsequently removed to this Court on February a23, 1987. QTC> argues for the application of section 568, comment (f) of the Restatement (Second) of Torts which provides that defamatory words spoken to a newspaper reporter and later published constitutes libel. QTC argues therefrom that the one-year statute of limitations provided for libel actions (T.C.A. ** 28-3-104(a)) should apply to its claim of trade disparagement. The Court is reluctant to apply this rationale in this case where the plaintiff's claim arises under Tennessee law, absent clear authority in the Tennessee courts for such a construction. Pursuant to T.C.A. ** 28-3-103 and Heller, application of the six months limitations period would appear to bar QTC's claim of trade disparagement -- slander.

L.Ed.2d 1454, 79 S.Ct. 1331 (1959); and more recently, Westfall v. Erwin, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). Defendants also assert that principles of qualified official immunity bar plaintiff's claim based on deprivation of its liberty and property interests protected by the Fifth Amendment to the United States Constitution. See Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396, (1982); Anderson v. Creighton, 483 U.S. 635, 107 S.Ct/ 3034, 97 L.Ed.2d 523 (1987). Defendants further challenge the merits of plaintiff's claim based on deprivation of Fifth Amendment due process on the ground that plaintiffs have no recognized liberty and/or property interest in the subject contract.[2]

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[2] Initially, plaintiff's constitutional claim asserted as plaintiff's "fourth cause of action," para. 48, 49 and 50 of the

Because the Court finds the applicability of absolute official immunity and qualified immunity is, if legally available to the defendants, dispositive of the issues raised by the defendants' summary judgment motion, the Court will address the immunity question first.

QTC's complaint alleges three state law causes of action under Tennessee common law and Statutes, together with a fourth federal constitutional claim grounded in Fifth Amendment due process protections. Defendants assert that they are immune from suit on the state law claims because they

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complaint, asserted only deprivation of a protected property interest as a result of the alleged contract breach. However, plaintiff has pending a motion to amend its complaint to add a claim for deprivation of a protected liberty interest as a result of the same nucleus of events (Court File No. 84). Defendants oppose this attempt to amend plaintiff's complaint (Court File No. 101).

are entitled to absolute official immunity under the principles announced by the Supreme Court in Barr v. Matteo, 360 U.S. 564' 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959), and Howard v. Lyons, 360 U.S. 593, 79 S.Ct. 1331, 3 L.Ed.2d 1454 (1959). QTC responds in opposition to defendants' claim of absolute immunity by pointing out that such federal official immunity does not apply to defendant Steven White because he is not a federal employee of the kind entitled to immunity from suit. QTC points to the specialized nature of the contractual relationship between TVA and its contractor, defendant Stone & Webster, which in turn contracted with Stemar Corp. for the services of White. As QTC points out, the arrangements between these contracting parties to secure White's services as TVA's Manager of Nuclear Power reveal an intent to side-step regular

hiring practices and the related federal statutory and regulatory limitations on salary and compensation. QTC relies heavily on distinguishing White's employment status with TVA as a "loaned employee" in its assertion that he is not the type of federal employee or independent contractor entitled to the benefit of official immunity. The Court believes QTC's focus on Steven White's employment "status" in determining his entitlement to immunity from suit is misplaced.

In Barr v. Matteo, the Court was faced with the issue of whether a federal executive branch official could be held civilly liable under the libel laws of the District of Columbia for allegedly defamatory statements contained in a press release regarding the reason for the suspension of other officers of his agency. The issue as framed by the court,

that also describes the rationale for the official privilege, is the balance between the individual's right to protection from pecuniary damages caused by the actions of government officials and "the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." 360 U.S. at 565, 3 L.Ed.2d at 1438.

The purpose of this grant of official immunity is plainly described in Barr:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties -- suits which would consume time and energies which would otherwise be devoted to

> governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

360 U.S. at 571, 3 L.Ed.2d at 1441. See also Butz v. Economou, 438 U.S., 478, 506, 98 S.Ct. 2894, 2910, 57 L.Ed.2d 895 (1978).

However, the privilege or immunity against civil suits afforded government officials is not unlimited in its scope, where its application in the federal courts requires that the act complained of "must have been within the scope of (the official's) powers; . . . ." Barr, 360 U.S. at 572, 3 L.Ed.2d 1441. Nor is the reach of immunity protection limited by position or status. Specifically, the Barr Court held that principles of immunity extend beyond "executive officers of cabinet rank," noting "(t)he privilege is not a badge or emolument of exalted office, but an expression of a policy designed to

aid in the effective functioning of government." Id. at 572-73: 3 L.Ed.2d at 1442. It is not the status or level of an official within the hierarchy of government that is determinative. It is, instead, the scope of that official's duties which defines the bounds of his protection. So long as the act complained of is within those bounds, i.e., "within the outer perimeter" of the official's duties, the official is entitled to immunity. Barr at 575, 3L.Ed.2d at 1443.

Very recently in Westfall v. Erwin, the Supreme Court refined the standards applicable to absolute official immunity, making the official's exercise of discretion a necessary element. 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988). The rule started in Westfall is that "absolute immunity from state-law tort actions should be available only when the

conduct of federal officials is within the scope of their official duties and the conduct is discretionary in nature." Westfall clarified the "discretionary" requirement previously assumed to be an element in Barr by many courts, on the theory that it inherently arose from an officials' status. See Westfall, 98 L.Ed.2d at 626, n. 4. Westfall also reinforces the Barr Court's holding that it is not the public official's status that is determinative of his entitlement to immunity, but rather the focus is a "functional inquiry" whereby "immunity attaches to particular official functions, not to particular offices." Westfall, 98 L.Ed.2d at 625, n. 3 (citations omitted). As the footnote explains:

> The adoption of this functional approach reflects the Court's concern expressed in Doe (Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912 (1973)),

> that federal officials be granted absolute immunity only insofar as the benefits of immunity outweigh the costs. Because the benefits of official immunity lie principally in avoiding disruption of governmental functions, the inquiry into whether absolute immunity is warranted in a particular context depends on the degree to which the official function would suffer under the threat os prospective litigation.

Id. There is additional authority for this proposition in other Supreme Court decisions applying absolute and qualified immunity. See Cleavinger v. Saxner, 474 U.S. 193, 201, 106 S.Ct. 496, 88 L.Ed.2d 507, 514 (1985); Briscoe v. LaHue, 460 U.S. 325, 342, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); Harlow v. Fitzgerald, 457 U.S. at 810, 102 @.Ct. 2727, 73 L.Ed.2d 396 (1982); Butz v. Economou, 438 U.S. at 511, 98 S.Ct. 2894 (1978); Mitchell v. Forsyth, 472 U.S. 511, 521, 105 S.Ct. 2806, 86 L.Ed.2d 411, 422 (1985); Forrester v. White, 484 U.S.

219, 108 S.Ct. 538, 98 L.Ed.2d 555,563 (1988); Spalding v. Vilas, 161 U.S. 483, 16 S.Ct. 631, 40 L.Ed. 780 (1896).

QTC's argument that White's employment status is determinative of his entitlement to immunity ignores the Supreme Court's determination that a functional inquiry is in fact the proper analysis. Likewise, QTC's reliance upon Tennessee immunity cases in support of its argument that White is not entitles to immunity is misplaced, where it is clear that "the scope of absolute official immunity afforded federal employees is a matter of federal law, 'to be formulated by the courts in the absence of legislative action by Congress.'" Westfall, 98 L.Ed.2d at 625, quoting Howard v. Lyons, 360 U.S. at 597.

The issue raised by the defendants' claim of absolute official immunity is whether, when applying the "functional

inquiry" to these defendants, they performed the type of federal government function contemplated by the applicable Supreme Court precedent. The Court finds they did. The Tennessee Valley Authority was created by an Act of Congress in 1933. See 16 U.S.C. §§ 831 et seq. It's primary purpose at the time of its creation was the promotion of navigation on the southeastern waterways within its jurisdiction, and controlling floods. See Grant v. Tennessee valley Authority, 49 F.Supp. 564 (D.C. Tenn. 1942). The TVA was also vested with the authority to create facilities for the generation of electric power, originally envisioned as a natural out growth of the construction of dams and reservoirs necessary to facilitate flood control and waterway navigation. See 16 U.S.C. § 831h-1. As have been declared by many courts, the TVA is a federal government corporation

-- "an agency performing wholly governmental services, and is an instrumentality of the United States." PRI Pipe Supports v. TVA, 494 F.Supp. 974, 975 (N.D. Miss. 1980) (citations omitted); see also TVA v. Kinzer, 142 F.2d 833 (6th Cir. 1944). It is clear that TVA performs a governmental function of the type contemplated by the judicially-created official immunity doctrine.

With regard to Steven White and the other defendants hired by TVA to manage its nuclear power program, the "functional inquiry" described in Westfall requires consideration of the functions these defendants performed for TVA. The relationship between the TVA and the defendants Steven White is defined by the January 3, 1986 "Memorandum of Understanding" made a part of the record in

this case.[3] See Collective Exhibit 1 to Affidavit of Glinski, Court File No. 26; also contained as exhibit 49, Court File No. 92. That memorandum of understanding contains the following provisions, relevant to this inquiry:

> 1. Steven White and "certain other personnel" are loaned employees pursuant to TVA contracts with defendant Stone & Webster, and White is the "Manager of Nuclear Power."
>
> 2. The Manager of Nuclear Power will have direct authority and responsibility for the management, control and supervision of TVA's entire nuclear power program, including but not limited to, the design, construction, maintenance and operation of all existing or planned TVA nuclear power plants.

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[3] Unless otherwise noted, all contract documents cited as defining the relevant agreements between the parties appear to have been duly executed and authentic. The Court assumes the exhibit documents are correct copies of the parties' valid and duly executed agreements.

The Manager of Nuclear Power shall have the authority to establish management and operating policies and procedures related to TVA's nuclear power program. The Manager of Nuclear Power should also have the authority to hire, remove, assign, reassign, or direct any personnel supplied by outside contractors, and subject to the approval of the Board of Directors with respect to senior level TVA managers in accordance with existing reservation of authorities by the TVA Board, any TVA personnel engaged in nuclear power program activities as he may deem necessary or desirable to implement such policies or procedures. . . . (T)he manager of Nuclear Power shall be responsible for all personnel, planning, scheduling, regulatory, licensing, engineering, construction, operational, quality assurance, training, maintenance, and other technical or administrative matters relating to the TVA nuclear power program and shall have the authority to review and approve, and subject to the approval of the General Manager and the Board of Directors, redirect and/or restructure the activities and functions of any existing TVA office in these areas insofar as they pertain to the nuclear power program. The manager of Nuclear Power shall be TVA's principal

spokesman on public information matters. . . . The Manager of Nuclear Power shall be the primary line manager with responsibility to determine the need for, requisition, technically evaluate, and receive all materials and services required for the nuclear power program. . . . The Manager of Nuclear Power is authorized and directed to cooperate fully with the United States Nuclear Regulatory Commission and any other agency or entity, governmental or otherwise, with jurisdiction over or interest in TVA's nuclear power program to assure the safe, reliable, and efficient design, construction, operation, and maintenance of TVA's nuclear facilities, and shall be responsible for all aspects of TVA's relations with such agencies and entities.

3. The Manager of Nuclear Power shall have direct access to the TVA Board of Directors and shall report directly to the General Manager and the Board of Directors. . . . With the exception of the Inspector General and General Counsel functions, all internal TVA activities or functions and/or outside contractors currently reporting to the TVA Board with respect to the TVA nuclear power program shall report to the Manager of Nuclear Power. . . .

> The Manager of Nuclear Power shall be authorized to contract for such personnel services as he shall deem necessary to support the TVA nuclear power program or the functions of the Office of Nuclear Power. In addition to the specific powers described herein, the Manager of Nuclear Power is authorized to undertake or have the appropriate TVA office or outside contractor(s) undertake, such studies, activities, or programs he deems necessary to improve the safety, reliability, or efficiency of TVA nuclear facilities and to take any other actions that he deems necessary or appropriate to improve the effectiveness of the overall management of TVA's nuclear power program and carry out the purposes of the Memorandum of Understanding.
>
> . . . .
>
> 5. As Manager of Nuclear Power, Mr. White will be subject to all applicable TVA rules and procedures covering TVA employees, including specifically the regulations and other requirements on employee conduct, conflicts, and ethics. . . .

Also relevant to this inquiry are the contract supplements and revisions

subsequently negotiated between Stone & Webster and TVA respecting arrangements for "loaned employees." Specifically, Supplement 2 to contract No. TV-68879A (Exhibit 51, Court File No. 92) contains modifications of the parties agreement, including the following relevant amendments:

> Appendix 1 - Guidelines for Senior Manager (STEMAR)
>
> . . . .
>
> 2. The Manager of ONP (Office of Nuclear Power) may make decisions on the need for additional services or equipment of any type. He may also identify companies deemed qualified to supply such services or equipment, ...

In addition to the above-cited documents which define the scope of authority of the TVA Manager of Nuclear Power, the defendants have filed the affidavit of William F. Willis, General Manager of TVA

(Court File No. 35), whose duties include direct involvement with the matters relevant to this case, and who has personal knowledge of the facts here relevant. In his affidavit, Willis defines the authority given the Manager of Nuclear Power by the TVA Board as follows:

> 3. The TVA Board of Directors determined that, in order to ensure that such safety concerns would be properly addressed and the units put into operation, a Manager of TVA's Office of Nuclear Power (ONP) was needed with direct authority and responsibility for the total management, control, and supervision of TVA's entire nuclear power program. The TVA Board sought a highly qualified and nationally respected manager in the nuclear field and on January 3, 1987, the TVA Board selected retired Admiral Steven A. White for this position.
>
> . . . .
>
> 5. The Board delegated to Mr. White, who assumed his duties on January 13, 1986, broad and far-reaching authority. Mr. White is responsible for the daily management of the nuclear power

> program and looks to me as the TVA General Manager and to the TVA Board for oversight, direction, and support.

Affidavit of Willis, Court File No. 35

As recently stated by the Supreme Court, in applying the requisite analysis contemplated by the "functional" approach to immunity questions, courts are to:

> examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and . . . . seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions. Officials who seek exemption from personal liability have the burden of showing they such an exemption is justified by overriding considerations of public policy, and the Court has recognized a category of "qualified" immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.

Forrester v. White, 98 L.Ed.2d 555, 563 (1988) (citations omitted). It is this

framework order which this Court must assess the defendants' claim of absolute official immunity.

As the provisions cited from the Memorandum of Understanding between TVA and Stone & Webster regarding White's duties as Manager of Nuclear Power indicate, taken together with the affidavit of TVA General Manager Willis, as TVA Manager of Nuclear Power, Steven White was given responsibility for the operation of TVA's entire nuclear program, answering only to the General Manager and the Board of Directors. His authority included supervision of the daily operation of the nuclear power program, as well as any employees and contractors involved in all phases of TVA nuclear power, including QTC. His duties encompassed authority over TVA nuclear power personnel and contracts for work to be performed for TVA at the various

plants. The broad grant of authority given White is evidenced by the parties' use of both specific grants of authority and general terms indicating that many management decisions were discretionary. Clearly, White was authorized to take most any action deemed "necessary or appropriate" by him to accomplish his task of restoring the TVA nuclear power program to operation. See para. 2, 3 of Exhibit 49, Memorandum of Understanding, Court File No. 92. It is clear that the job for which QTC was hired and which it substantially performed (contract No. TV-66317A) fell within the parameters of the management duties for which White was hired. At the relevant time, identifying and addressing the safety concerns expressed by TVA employees was a high priority task, crucial to returning the TVA nuclear program to operating status. See Willis Affidavit at

para 2, 3; Whitt affidavit at para 2-5, Court File No. 34; Mason Affidavit at para 2-3; Plaintiff's Brief in Response to Motion for Summary Judgment, Court File No. 87, at 1.

The Court finds, based on the terms of the documents above-cited and the affidavits filed by the defendants that QTC's contractual relationship with TVA was "within the scope of (the defendant White's) official duties." See Westfall, 98 L/Ed.2d at 625. QTC has offered no evidence to rebut this conclusion. It is, therefore, clear that the first prong of the absolute immunity test set out in westfall is satisfied. Id.

Second-Prong Analysis

The second prong of the Westfall test, that the challenged official actions be discretionary in nature remains to be

considered. Plaintiff QTC was a contractor hired by TVA to conduct interviews and compile information relevant to TVA nuclear power employee safety complaints. The terms of its contract call for it to perform "personal services" on a "when and as requested" basis for TVA. See Exhibit 30, Court File No. 92. The contract was expanded and extended on more than one occasion. See Exhibits 31-33, Court File No. 92. Steven White, as Manager of Nuclear Power, had the direct authority and responsibility to manage the TVA nuclear power program pursuant to certain specific grants of authority (see Memorandum of Understanding) including the authority "to hire, remove, assign, reassign, or direct any personnel supplied by outside contractors . . . as he may deem necessary or desirable (sic) . . . ." para 2, Exhibit 49, Court File No. 92. The Manager of

Nuclear Power certainly had responsibility for the safety of the nuclear program and administering the contract with QTC for review of employee safety complaints pursuant to the broad authority given him. The choices made regarding the QTC contract, its subject matter and performance were within his scope of authority. As Manager of Nuclear Power, he was ultimately responsible for decisions regarding the performance of that contract and was surely the official with ultimate authority to determine the services required of QTC on an "as and when requested" basis.

Whether or how to utilize the "personal services" of QTC under the contract certainly fell within the broad grant of general authority given White to operate the TVA nuclear power program. Within that scope of responsibility, White

dealt with the QTC contract and its implications for the nuclear program restart. His actions affecting the QTC contrast challenged by QTC in this case include his allegedly making defamatory statements about QTC personally to other federal officials -- statements which were also published in the press, and his alleged tortious interference with QTC's existing contractual relationship with the TVA. QTC's claims arise from White's decision to stop requesting its services because QTC's contract performance was not what he as Manager of Nuclear Power desired. Despite the fact that White himself has not offered evidence to explain his decision regarding QTC, or the manner in which it was made, the decision of how best to use a

contractor was certainly within the scope of his discretionary authority, outlined previously.

Specifically, QTC alleges that defamatory statements were made to a Congressman and later given by White to the press to the effect that QTC was terminated because it did not measure up to White's own quality standards and QTC's services cost too much. See Plaintiff's Response, Court File No. 87, and Exhibits 8 and 9, Court File No. 92. These statements were apparently made by White in response to inquiries regarding why QTC was being phased out by TVA. The Court finds ample evidence in the record to support the conclusion that such statements were made within the scope of White's duties as TVA's Manager of Nuclear Power and reflect his personal opinion as to the quality and performance of QTC. See, e.g., Queen v.

Tennessee Valley Authority, 689 F.2d 80, 86 (6th Cir. 1982); Walters v. Tennessee Valley Authority, 503 F.Supp. 111, 115 (E.D. Tenn. 1980), aff'd 698 F.2d 1225 (6th Cir. 1982) (Table, No. 80-5430), cert. denied, 459 U.S. 823 (1982). Plaintiffs have failed to challenge the defendants' claims that their actions were discretionary, and may not rely on the allegations of their complaint to create an issue of fact in light of the affidavits ordered by the defendants relative to this issue. These factual circumstances lead this Court to conclude that the challenged actions were in fact discretionary, and therefore satisfy the second prong of the Westfall test. For these reasons, the Court finds the standards for absolute official immunity have been satisfied. See Westfall, 98 L.Ed.2d at 626. The Plaintiffs' state-law tort claims against

Steven White will be DISMISSED. Because QTC alleges its injury to be the direct result of the discretionary actions of Mr. White, while acting in his official capacity, and because this Court has found him to be absolutely immune from common law tort liability, there can be no liability as to defendants STEMAR and Stone and Webster.[4] This result is so because " Tennessee law does not impose vicarious liability when the agent is not subject to individual liability." Queen v. Tennessee Valley Authority, 508 F.Supp. 532, 535-36 (E.D.

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[4] Defendant STEMAR is a closely held corporation, the principals of which are Steven White and his wife, that contracted with Stone & Webster Engineering Company to provide consulting services. Defendant Stone & Webster is a large engineering concern that contracted with TVA to provide the services of Steven White, through STEMAR, as a "loaned employee" to TVA's nuclear power program.

Tenn. 1980), citing Walters, 503 F. Supp. at 116.

QTC's Constitutional Claim

With regard to QTC's assertion that the defendants' actions also deprived it of its Fifth Amendment right to due process because there was no due process hearing before termination of its services under the TVA contracts, the defendants assert that they are shielded by the protection of qualified immunity. Qualified immunity standards are clearly set forth in Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). "In Harlow, the Supreme Court held that federal officials performing discretionary functions are shielded from liability for civil damages if 'their conduct does not violate clearly established constitutional rights of which a reasonable person would have known.' Newhouse v. Probert, 608

F.Supp. 978, 982 (W.D. Mich. 1985). As previously noted, there is ample documentary evidence supporting the conclusion that the decision to terminate or alter in any way the activity of a contractor working within the TVA nuclear power program was within both the general and specific scope of authority granting the Manager, and discretionary.

The Court must now determine whether the defendants' conduct violated the plaintiffs's "clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow, 457 U.S. at 88, 73 L.Ed.at 40. In Harlow, the Court created an objective test for such determination, directing courts to consider the 'objective reasonableness of an official's conduct, as measured by reference to clear established law, . . ." Id. Further, where the issue arises in the

context of a summary judgment motion, the resolution of this issue becomes a question of law for the Court. It is for this Court to determine both the applicable law, and whether it was "clearly established" at the time of the defendants' challenged actions. Id. See also Washington v. Starke, 855 F.2d 346, 348 (6th Cir. 1988).

Plaintiff asserted initially only a "property" interest protected by the Fifth Amendment from deprivation absent due process of law. It now seeks to amend its complaint to allege the deprivation of a protected "liberty" interest as well. The Court will consider the validity of both claims under these facts.

Initially, QTC's assertion of injury to a protected "property" interest requires that it show that it had a property interest in continued employment under its contract with TVA. In opposition to QTC's

assertion, the defendants rely upon contract terms which describe the parties' agreement as a "personal services" contract, under which QTC agreed to render services to TVA "when and as requested" by TVA. See Exhibits 11 and 30, Court File No. 92. In order for QTC to have a "property" interest in the TVA contract, it must have "a legitimate claim of entitlement" to performance under it. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548, 56 (1972). In this case, QTC's property interest in the TVA contract is defined by the language of the contract itself. The Court is hard pressed to find a property interest created by the terms of the instant contract.

The nature of a personal services contract is such that the parties' agreement as to the services to be

performed defines their obligations under the contract. In this case, contract No. TV-66317A provided that QTC would perform for TVA the specifically described services in Paragraph 1.A.(1)-(11) of the contract (Exhibit 30), "when and as requested" by TVA. Clearly, services were requested by TVA and undertaken by QTC, as evidenced by the subsequent amendments to the original contract, and the fact that sums were expended by TVA in payment therefor. See Exhibits 31-33, Court File No. 92. However, any "property" interest QTC may have would certainly be limited to only those personal services actually requested by TVA, but not extending to the performance of services not requested. This much QTC admits in its response. See Plaintiff's Response at 22, n. 6, Court File No. 87.

QTC also (or instead) relies upon an asserted "liberty" interest that it claims was deprived by the defendants' alleged interference with the TVA contract and alleged defamatory statements. QTC asserts that it has a protected "liberty" interest in its reputation, which was injured by the defendants' actions. As QTC has pointed out, the leading case on this point is Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), in which the Supreme Court found:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that the reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

424 U.S. at 701, 47 L.Ed.2d at 414. Mere defamation, without a resulting actual injury is insufficient to state a claim under the Fifth Amendment. Id. at 702.

The Supreme Court has considered, under various factual circumstances, what actual injury is necessary when paired with a defamation to create a constitutionally recognized injury. In United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court found that government action labeling three government employees as "subversive" and "unfit for Government service" so severely stigmatized their reputation and future livelihood that their discharge amounted to a "proscription of these employees prohibiting their ever holding a government job," Paul, 424 U.S. at 702 (quoting Lovett, 328 U.S. at 324). Likewise, in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 71 S.Ct.

624, 95 L.Ed 817 (1951), the Court held, without a majority in agreement, that merely being designated as "subversive" or "communist" is alone not actionable, but when coupled with the deprivation of employment can state a cognizable claim. "To be deprived not only of present government employment but of future opportunity for it certainly is no small injury when government employment so dominates the field of opportunity." McGrath, 341 U.S. at 184-85. Subsequent to McGrath, the Court held that a government contractor's employee discharged by the commanding Navy officer was not entitled to a Fifth Amendment due process hearing where the private interest asserted by the employee was the right to a particular employment. In Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S.Ct. 1743, 6

L.Ed2d 1230 (1961), the Court held no liberty interest was implicated when government action merely denied the plaintiff" the opportunity to work at one isolated and specific military installation," but did not affect her "chosen trade or profession . . . [and she] remained entirely free to obtain employment as a short-order cook or to get any other job . . . " Id., 367 U.S. at 895, 6 L.Ed.2d at 1236. Clearly, it is the "attendant foreclosure from other employment opportunity" resulting from an injury to one's reputation which gives rise to protections of the Fifth Amendment. McElroy, 367 U.S. at 898, 6 L.Ed.2d at 1238. See Roth, 408 U.S. at 572-74, 33 L.Ed.2d at 558-59.

QTC asserts that this case is the "different case" referred to by the Roth Court which would present facts

establishing a violation of Fifth Amendment protected liberty interest. In distinguishing the facts in Roth from facts in supporting a liberty interest, the Court found that Roth's treatment by the Board of Regents did not "foreclose his freedom to take advantage of other employment opportunities," where the defamation alleged "did not . . . seriously damage his standing and associations in his community." Nor did the published reasons for his not being rehired involve allegations of "dishonesty, or of immorality." Roth, 408 U.S. at 573, 33 L.Ed.2d 558. In contrast, QTC asserts that the allegedly defamatory remarks of the defendants caused an actual injury to its reputation that satisfies the Supreme Court's test for creating an injury compensable under the Fifth Amendment. In support of this claim, QTC has submitted an

affidavit purporting to show that QTC was denied specific employment subsequent to and because of the allegedly defamatory remarks of the defendants. See Court File No. 90.

The Court has reviewed this affidavit and is not convinced that the factual assertions contained therein establish that QTC was foreclosed from obtaining subsequent employment as a result of the challenged statements. Specifically, paragraphs 7 and 8 of the affidavit indicate that although QTC was apparently not considered for the potential contract with Houston Lighting & Power due to "the reputation of their company and their work for TVA," the affidavit concludes by stating in paragraph 8 that no company was hired to perform the work that QTC asserts that it was denied. It appears that at most, QTC may have been denied the

opportunity of serious consideration for the Houston work; however, since no work was ever performed under that specific, potential contract by any contractor, it is difficult to conclude that QTC was actually denied this employment opportunity. Nevertheless, the Court must determine whether QTC has produced sufficient material evidence of a protected liberty interest to withstand the challenge of the defendants' motion.

"To establish a liberty interest, an employee must demonstrate that his governmental employer has brought false charges against him that 'might seriously damage his standing and associations in his community,' or that impose a 'stigma or other disability' that forecloses freedom to take advantage of other employment opportunities.'" Wells v. Hico Indep.Sch.

Dist.,736 F.2d 243, 256 (5th Cir. 1984), cert. dismissed, 473 U.S. 901 (1985). It is clear that the "stigma" resulting from the damage to QTC's reputation must be serious in order to implicate a protected constitutional liberty interest. Just how serious the stigma must be is sometimes thought to be a mystery. See Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987). In the Seventh Circuit, the standard announced in Colaizzi to identify a protected "occupational liberty" interest holds "that to fire a worker to the accompaniment of public charges that make it unlikely that anyone will hire him for a comparable job infringes his liberty of occupation." Id. Apparently, under this line of cases the mere threat or likelihood that the dismissal and damage to reputation will adversely affect future employment is sufficient to create a liberty interest.

Other courts have defined the standard a bit more narrowly by requiring that public accusations of "dishonesty", "immorality", or "moral turpitude" form the basis for dismissal before a protected liberty interest can be asserted in one's reputation. See Bollow v. Federal Res. Bank of San Francisco, 650 F.2d 1093, 1101 (9th Cir.), cert. denied, 455 U>S> 948 (1981) (citations omitted). In several cases cited by the Bollow court, it was held that dismissal based on incompetence, unsatisfactory performance or personnel problems was insufficient to infringe a liberty interest. Id. See also Loehr v. Ventura County Comm. College Dist., 743 F.2d 1310, 1317 (9th Cir. 1984); Hadley v. Du Page county, 715 F.2d 1238, 1245 (7th Cir. 1983), cert. denied, 465 U.S. 1006 (1984); Robertson v. Rogers 679 F.2d 1090, 1091 (4th Cir. 1982); Gray v. Union County

v. Inter. Fd. Dist., 520 F.2d 803, 806 (9th Cir. 1975); Lake Michigan College Fed. of Teachers v. Lake Michigan Comm. College, 518 F.2d 1091, 1097 (6th Cir.), cert. denied, 427 U.S. 904 (1975); Abeyta v. Town of Taos, 499 F.2d 323, 332 (10th Cir. 1974); Schwartz v. Thompson, 497 F.12d 430, 432 (2d Cir. 1974).

In this Circuit, the applicable cases require that the challenged dismissal and resultant "stigma" on a plaintiff's reputation must involve "the voluntary, public dissemination of false information in the course of a decision to terminate . . . employment." Burkhart v. Randles, 764 F.2d 1196, 1201 (6th Cir. 1985). See also Kendall v. Board of Ed. of Memphis City Sch., 627 F.2d 1, 5 (6th Cir. 1980). For authority requiring that the allegations forming the basis for dismissal from employment and the resulting "stigma" to

one's reputation to be challenged as "substantially false" in order to state a due process claim, see Codd v. Velger, 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977). As the Supreme Court explained, the due process denied a dismissed and stigmatized employee is the opportunity to refute the charges of improper conduct and clear his or her name. If the truth of the charges is not challenged, then "no hearing would afford a promise of achieving that result. . . ." Id.

In this case, QTC's claim arising from the alleged deprivation of its "liberty" interest centers on the injury to its business reputation perceived to be the result of statements made by defendant White and defendant BETA's officer, Mr. Wegner, subsequently published by the media. Specifically, it was reported in various newspaper articles (Exhibits 8 and

9, Court File No. 92) that White caused the reduction of QTC's role at the Watts Bar Nuclear plant because QTC "cost too much; was too slow) and didn't meet White's standards of quality." White is further quoted as telling a congressman that QTC was "lazy, slow, and their reports are the worst I have ever read." The wire service also carried the following statement and quote:

> "But White said the process [QTC's investigation of TVA employee concerns] was moving too slow, and TVA was not getting a good return on its money.
>
> . . . .
>
> "My standards are very high, "White said. "So it is, perhaps not unheard of that Imight find a contractor who isn't meeting my standards in terms of the work itself."

Mr. Wegner is asserted to have told a Department of Labor investigator that "QTC was a cancer to be dealt with." QTC

asserts that these allegedly defamatory statements caused a recognized injury to its professional reputation. QTC asserts that the statements were sufficiently stigmatizing to be compensable as an inquiry to its constitutionally protected liberty interest. The Court disagrees.

"[A]llegations of improper or inadequate performance do not constitute a deprivation of liberty within the meaning of the fourteenth amendment." Lake Michigan College Fed. of Teachers, 518 F.2d at 1097 (citations omitted). Courts interpreting the Supreme Court's holding in Roth have held that charges of "incompetence, neglect of duty and malfeasance in office" are insufficient to support a claim of liberty interest deprivation. Id. See also Adams v. Walker, 492 F.2d 1003, 1006-09 (7th Cir. 1974). The Roth Court noted that the type of due

process guaranteed to protect one's liberty interest in his good name and reputation comes in the form of "notice and hearing" regarding the charges giving rise to the termination. Roth, 408 U.S., at 573. The Roth Court's elaboration on this point is important to the instant cases in that the examples offered by the Court involved charges of "dishonesty and immorality." Id. See also cases cited herein at 27-29. As noted by the parties, a pre-termination hearing may also be required under Roth where the charges resulted in "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573. The Court finds that the public statements made by White as justification for phasing out QTC, and of which QTC here complains, are not sufficient to infringe upon a protected liberty interest.

The statements made by White are clearly not of the kind generally considered to stigmatize one's reputation and good name. The statements merely reflected White's opinion of the competence and job performance of QTC and are not actionable under the numerous cases previously cited. See Loehr, 743 F.2d at 1317; Hadley, 715 F.2d at 1245; Robertson, 679 F.2d at 1091; Gray, 520 F.2d at 806; Lake Michigan College Fed., 518 F.2d at 1097; Abeyta, 499 F.2d at 332; Schwartz, 497 F.2d at 432; Blair v. Board of Regents, 496 F.2d 332 (6th Cir. 1974).

Because the Court finds that the facts of this case do not support the plaintiff;s claim that the defendant Steven White's actions deprived it of a protected "liberty" or "property" interest, the Court finds as a matter of law that Steven White is entitled to summary judgement.

Therefore, the Court is not required to reach the question of the defendant's entitlement to qualified immunity.

However, even if the remarks were legally actionable, the Court believes Steven White is entitled to qualified immunity from liability for his actions. See Smith v. White, 666 F. Supp. 1085, 1090-91 (E.D. Tenn. 1987).

Under the standard of qualified immunity enunciated in Harlow and recently applied in Anderson v. Creighton, the question of personal liability for otherwise unlawful official acts revolves around "the objective legal reasonableness" of the challenged actions, "assessed in light of the legal rules that were 'clearly established' at the time it was taken," by the official. See Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d at 530, citing Harlow, 457 U.S. at 819. See

also Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988). Under the objective standard, an official is immune from liability for civil damages if his or her actions could be reasonably considered "consistent with the rights they are alleged to have violated." Anderson v. Creighton, 97 L.Ed.2d at 530. Stated another way, the law existing at the time of the challenged action must "clearly proscribe the actions" of the official in order for the protection of qualified immunity to be denied. Mitchell v. Forsyth, 472 U.S. 511, 528, 105 S.Ct. 2806, ___, 86 L.Ed.2d 411, ___ (1985).

> [C]ases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right. This is not to say that an official

> action is protected by qualified immunity unless the very action in question has previously been held unlawful, (citations omitted) but it is to say that in the light of preexisting law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. at ___, 107 S.Ct. at 3039, 97 L.Ed.2d at 531.

As noted in this circuit, courts "should focus on whether, at the time defendants acted, the rights asserted were clearly established by decisions of the Supreme Court or the courts of this federal circuit." Garvie, 845 F.2d at 649 (citations omitted). See also Ohio Civil Ser. Empl. Assoc. v. Seiter, 858 F.2d 1171 (6th Cir. 1988). Defendants "have qualified immunity unless plaintiff's rights were so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained

from such conduct." Ramirez v. Webb, 835 F.2d 1153, 1156 (6th Cir. 1987), quoting Dominque v. Tleb, 831 F.2d 673, 676 (6th Cir. 1987). See also Garvie, 845 F.2d at 649-50; Seiter, 858 F.2d at 1173.

This Court does not believe that QTC's asserted legal rights were sufficiently "clearly established" at the time of the alleged defamation (or now) so that the defendant Steven White should, objectively, have "clearly understood" that his statements violated those rights. Clearly, a substantial portion of the relevant caselaw regarding the defamatory nature of published comments referring to an employee's incompetence, unsatisfactory performance or personnel difficulties holds that such criticisms, even if made publicly, do not amount to a violation of a protected liberty interest. See also

Garvie, 845 F. 2d at 649-650; Seiter, 858 F.2d at 1173.

This Court does not believe that QTC's asserted legal rights were sufficiently "clearly established" at the time of the alleged defamation (or now) so that the defendant Steven White should, objectively, have "clearly understood" that his statements violated those rights. Clearly, a substantial portion of the relevant caselaw regarding the defamatory nature of published comments referring to an employee's incompetence, unsatisfactory performance or personnel difficulties holds that such criticisms, even if made publicly, do not amount to a violation of a protected liberty interest. See Loehr, 743 F.2d at 1317; Hadley, 715 F.2d at 1245; Robertson, 679 F.2d at 1091; Gray, 520 F.2d at 806; Lake Michigan College, 518 F.2d at 1097; Abeyta, 499 F.2d at 332; Schwartz,

497 F.2d at 432. The Court has found no cases that support the plaintiff's claim that such a criticism infringes a constitutionally protected interest, therefore, the defendant could not have objectively believed his conduct violated a right or interest of QTC's.

The Court, therefore, concludes that QTC's constitutional rights asserted to have been violated by defendant Steven White's conduct were not so clearly established when the alleged defamatory remarks were made that White, objectively, could be said to have clearly understood that his conduct violated those rights. Steven White would, therefore, be entitled to the protection of qualified immunity under the facts of this case. For the reasons previously noted, defendants Stone & Webster and STEMAR cannot be held vicariously liable under these facts and

Tennessee law. See Queen, 508 F.Supp. at 535-36; Walters, 503 F.Supp. at 116.

QTC's Claim Against Defendant Beta, Inc.

QTC asserts that a statement made by the principal of defendant Beta, Inc., William Wegner, to a Department of Labor investigator and subsequently published in the media tortiously disparaged the trade and business reputation of QTC. The statement cited by QTC was given by Wegner during a May 30,1986 interview conducted by a Department of Labor ("DOL") investigator in which Wegner allegedly stated that "QTC was a cancer to be dealt with." See Plaintiff's Answers to Defendants' First Set of Interrogatories, Question and Answer 1, Court File No. 11. In addition, QTC asserts that defendant Beta, Inc., through William Wegner, interfered with its ongoing contractual relationship with TVA by specifically insisting that TVA terminate

its relationship with QTC during contract negotiations between Beta, Inc. and TVA. See Id., Question and Answer 4.

in their motion for summary judgment, defendants assert that the challenged statement given by Wegner is absolutely privileged as a result of the circumstances under which it was given by Wegner. The defendants assert that because the Wegner statement was given in the context of an official investigation conducted by a federal agency, see 42 U.S.C. § 5851, investigating the employment discrimination claims of certain previously dismissed TVA employees, the statement is not actionable. The Court agrees.

Wegner made the challenged statement while being interviewed by DOL investigators. The investigation was conducted pursuant to federal statute and the relevant federal regulations enacted

thereunder. See 42 U.S.C. § 5851 (b)(2)(A) and 29 C.F.R. 24.4(b) and (c). The regulation cited in fact provides for the confidentiality of information obtained. 29 C>F>R> 24.4(c). In this instance, there is no evidence to indicate that the statement given was intended for public dissemination. See Wegner Deposition at 125-26. The allegedly defamatory statement was taken down an official "Employee Personal Interview Statement" form, in the ordinary course of a fact-finding interview for use by the DOL in its labor complaint investigation. The inquiry was instigated by complaints filed by former TVA employees over their dismissal from TVA employment. See Marquant Affidavit, Court File No. 32. It does not appear to the Court that the statement was given in response to questions regarding QTC, but merely as "background information" or a description

of the complaints received about TVA conditions in the course of Wegner's employment through Beta, Inc. with TVA. See Wegner Deposition at 138. Wegner in fact stated that he was merely repeating what he had been told by one of three possible other persons associated with TVA. Id. at 134.

in order for QTC's claim that its liberty interest was deprived by Wegner's remarks to be actionable, QTC must show that the charges were made public by the employer. See Burkhart v. Randles, 764 F.2d 1196, 1201 (6th Cir. 1985); Bollow, 650 F.2d at 1101 (citations omitted). The Court finds that this element has not been satisfied by QTC. Wegner's deposition testimony clearly establishes that the statement was made under circumstances that led him to rely on its confidentiality (Wegner Deposition at 125) and that media

access to the statement originated outside the TVA nuclear power program. Specifically, Wegner asserts that his first notice that the statement was recorded in writing and public came when a member of Congress "was waiving it in the air at a hearing." See Wegner Deposition at 125. The Court is unaware of any evidence offered by QTC to rebut this assertion by Wegner that he did not publicly disseminate the challenged remark.

Additionally, as to the liability of Beta, Inc., the Court finds that since the challenged statements of Wegner are not actionable under QTC's constitutional theory, Beta, Inc. cannot be liable. Because all the acts performed and statements made that form the basis of QTC's claims were done by Wegner, and the Court has determined that he cannot be liable for damages, Beta, Inc. cannot

therefore he held vicariously liable. See Queen v. Tennessee Valley Authority, 508 F.Supp. 532, 535-36 (E.D. Tenn. 1980); Walters v. Tennessee Valley Authority, 503 F.Supp. 111, 116 (E.D.Tenn. 1980), aff'd. 689 F.2d 1225 (6th Cir. 1982) (Table, No. 80-5430), cert. denied, 459 U.S. 823 (1982).

An appropriate order will enter.

R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

QUALITY TECHNOLOGY COMPANY	§	
Plaintiff	§	
	§	
v.	§	
	§	CIV-1-87054
STONE & WEBSTER ENGINEERING	§	
ET AL	§	
Defendants	§	

O R D E R

The motion (Court File No. 177) of plaintiff, Quality Technology Company, to alter or amend the judgement pursuant to Fed. R. Civ. P. 59 (e) is DENIED in accordance with the accompanying memorandum. This suit remains DISMISSED.

SO ORDERED.

ENTER: June 1, 1989

R. Allan Edgar
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

QUALITY TECHNOLOGY COMPANY,	§	
	§	FILED:6/1/89
Plaintiff,	§	
	§	
v.	§	CIV-1-87-054
STONE & WEBSTER ENGINEERING	§	
COMPANY, INC., STEMAR COR-	§	
PORATION, BETA, INC., and	§	
STEVEN A. WHITE,	§	
	§	
Defendants.	§	

M E M O R A N D U M

Plaintiff, Quality Technology Company (hereinafter "QTC"), has filed a motion to alter or amend the judgment pursuant to Rule 59(e), Fed. R. Civ. P. (Court File No. 177), seeking reconsideration of this Court's previous order (Court File No. 176) granting the defendants' motion for summary judgment and dismissing this suit. See also Court's Memorandum, Court File No. 175. The defendants have responded in

opposition to the motion (Court File No. 193). QTC asserts that the Court's memorandum contains various legal errors in its analysis and disposition of the issues raised in this case. The Court will now consider the plaintiff's arguments.

Absolute Official Immunity

QTC once again argues that the Court incorrectly ignored Steven White's "employment status" in applying the "functional analysis" clearly mandated by the Supreme Court in Barr v. Matteo, 360 U.S. 564 (1959), and Westfall v. Erwin, 484 U.S. 292 (1988). QTC argues that the unique contractual arrangement between the Tennessee Valley Authority ("TVA"), Stone & Webster Engineering Company ("SWEC"), STEMAR and White is relevant to whether these defendants are entitled to the

protection of absolute official immunity. Specifically, QTC argues that White was not "lawfully entrusted" with governmental authority, the very exercise of which is the basis for the plaintiff's complaint. QTC relies upon the Comptroller General's opinion offered in response to an inquiry by a member of Congress, which determined that the contract between the defendants providing for White's services "constitutes the improper use of a personal services contract and represents a circumvention of the statutory ceiling on salary payments to TVA employees." See Court File No. 185, Appendix B, "Untitled" Opinion para. 86 FPBR 1087 (June 2, 1986) at X1-492.[5]

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[5] QTC argues, in conjunction with its reliance on the Comptroller General's report, that "there is no question that the contractual arrangements insisted on by the defendants were directly prohibited by the provisions of 18 U.S.C. § 208(a), the federal conflict of interest statute, . . .

This Court remains convinced that under proper legal analysis, the "functional" approach to immunity questions focuses on the "particular official functions" performed by the defendant -- not on the individual's "particular office[ ]" or "the status of the defendant." Westfall, 484 U.S. at __n. 3, 98 L.Ed.2d 619 n. 3; Briscoe v. LaHue, 460 U.S. 325, 342 (1983). As quoted in Cleavinger v. Saxner, " '[0]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant.' Absolute immunity flows not from rank or title or

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. " Plaintiff's Brief in Support, Court File No. 187 at 15. The Court notes, however, the the Comptroller General's opinion makes no reference to 18 U.S.C. § 208(a). In fact, the inquiry that resulted in the Comptroller General's opinion arose as an interpretation of TVA's statutory salary limitation, 16 U.S.C. § 831h.

'location within the Government,' but from the nature of the responsibilities of the individual official." 474 U.S. 193, 201 (1985) (citations omitted).

QTC challenges the status of White's contractual relationship with TVA and the other defendants as "illegal," arguing that because the agreement was viewed by at least on entity as constituting an "improper use of a personal services contract," White was not "lawfully entrusted" with the requisite discretionary authority necessary to assert the protection of official immunity. For the reasons that follow, the Court disagrees. Clearly, the mandated "functional analysis" determinative of an official's entitlement to immunity does not depend on the actor's employment status. See Memorandum, Court File No. 175 at 12-14. Furthermore, it would appear that White was in fact

"lawfully entrusted" with the authority to perform the discretionary functions relating to QTC and its personal services contract and supplements with TVA at all times relevant to the actions challenged by the plaintiff. Even assuming, without conceding, that the contractual agreement between TVA and White was somehow improper, there is ample evidence that White performed his responsibilities pursuant to the "Memorandum of Understanding" executed by the parties, and that parties recognized its terms as the basis for his relationship to TVA and its nuclear power program. It would appear from the record that, despite any claim that the contract between White and TVA should be void, White continued to perform his discretionary duties under the contract, and shared with TVA "the same interest in getting the Government's work done." Boyle v. United Technologies Corp.,

487 U.S.___, 101 L.Ed.2d 442, 453 (1988).[6] In any event, as far as this Court is aware, the record contains no legally binding determination that the contract arrangements between TVA and the defendants were improper or illegal under 18 U.S.C. 208(a). The Court, therefore, finds that there exists no genuine issue of material fact regarding the validity of the TVA contractual arrangements with White as it may arguably relate to White's entitlement to the protection of official immunity and the "functional" analysis thereunder.

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6 The analysis of "discretionary function" by the Court in Boyle, 101 L.Ed.2d. at 457, would similarly support this Court's conclusion that White performed a "discretionary function" on behalf of TVA. Certainly White was called upon to exercise considerable judgment in the management and operation of the TVA nuclear program, balancing many technical, managerial and employment considerations, very similar to those described and relied upon in Boyle.

As for the Court's holding that White was also entitled to the protection of qualified immunity from liability for the asserted constitutional tort claim, QTC argues that the Court ignored the fact that QTC was prevented by the defendants from performing services previously requested at the time QTC responsibilities were scaled back. Initially, it is important to reiterate that QTC had no recognized property interest in continued employment under a personal services contract that called for QTC's performance "when and as requested" by TVA. See Memorandum, Court File No. 175 at 26-27. As the defendants point out in response to this argument, the record indicates that QTC was paid the agreed upon contract price for its negotiated thereto. It appears that this contract expired when the parties failed to reach agreement on a fifth supplement.

However, QTC entered into another contract with the TVA to assist the agency in setting up an employee response team ("ERT") program to investigate employee safety complaints. That second contract was known as TV-68705A and, under similar terms as TV-66137A, was a personal services contract "when and as requested." See Deposition Exhibit 11, Court File No. 92, Appendix F.

QTC likewise acquired no recognized property interest in continued employment pursuant to the terms of this second contract. QTC has failed to come forward with " significant probative evidence " to support its claim of injury to a recognized property or liberty interest arising under the parties relationship defined by the second contract, TV-68705A. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986). QTC's argument that the

executed contract and subsequent summary letter (Exhibit 11, Court File No. 102) are sufficient to withstand the defendant's motion and the appropriate legal standard is without merit (see Court File No. 187, QTC's Brief in Support at 7). The Court previously determined (Memorandum, Court File No. 175 at 27-35) that the alleged damage to QTC's reputation resulting from the defendants' remarks

Court File No. 175 at 27-35) that the alleged damage to QTC's reputation resulting from the defendants' remarks critical of its performance did not constitute an injury to QTC's protected "liberty interest" because the Court found that the remarks were not legally actionable. The Court, on reconsideration, remains convinced of the correctness of that determination for the reasons previously stated.

QTC also argues that the Court failed to acknowledge that certain "reasonable inferences" could be drawn from facts alleged by QTC in support of its claim of a conspiracy. QTC has asserted that the alleged conspiracy was formed by the defendants prior to the beginning of their contract arrangements and service for TVA for the purpose of "obtaining control of TVA's nuclear program." See QTC's Brief in Support at 9-13. QTC argues that improper motives can be gleened from the evidence, which, when considered in the light provided by QTC's argument of the facts, challenges the defendants' entitlement to immunity. The Court is convinced that kQTC's argument on this issue is too pale to withstand summary judgment. Clearly, the actor's motive in performing a discretionary governmental function will not alone bar the application of official

immunity in appropriate cases. See Barr v. Matteo, 360 U.S. at 575; Palermo v. Rorex, 806 f.2d 1266, 1272 (5th Cir. 1987). Clearly, the specific actions of the defendants on which QTC relies in support of its constitutional claims occurred subsequent to the time the defendants began their contract work for TVA.[7] Any motives, proper or improper, that some or all of these defendants may have had for seeking out a business relationship with TVA are irrelevant to QTC's claims in this suit and the defendants' entitlement to immunity where the standards for the proper application of official or qualified immunity are otherwise satisfied.

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[7] The record establishes that QTC's participation in the ERT program was reduced after White took over TVA's nuclear power program.

For the reasons herin stated, together with those set forth in the Court's previous memorandum, Court File No. 175, plaintiff's motion to alter or amend the judgment granting the defendants' motion for summary judgment will be DENIED. An appropriate order will enter.

R. Allan Edgar
United States District Judge

NOT RECOMMENDED FOR PUBLICATION

No. 89-5991/6125

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

QUALITY TECHNOLOGY COMPANY	§	
	§	
Plaintiff-Appellant	§	ON APPEAL FROM
	§	THE UNITED
	§	STATES DISTRICT
v.	§	COURT FOR THE
	§	EASTERN
STONE & WEBSTER	§	DISTRICT OF
ENGINEERING COMPANY, INC.;	§	TENNESSEE
STEMAR CORPORATION; BETA,	§	
INC.; STEVEN A. WHITE	§	

Defendants - Appellant

Decided and Filed August 2, 1990

BEFORE: KRUPANSKY and NORRIS, Circuit Judges; and MILES, District Judge

PER CURIUM. Plaintiff, Quality Technology Company, appeals from the district court's having granted summary judgement to defendants.

Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the

parties, we are unable to say that the district court erred in granting summary judgement to the defendants.

As the reasons why judgement should be entered for defendants have been articulated by the district court, the issurance of a written opinion by this court would be duplicative and serve no useful purpose. Accordingly, the judgement of the district court is **affirmed** upon the reasoning set out by that court in its memorandum opinions of March 27, 1989 and June 1, 1989.

NO. 89-5991/6125

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUT

QUALITY TECHNOLOGY COMPANY Plaintiff VS. STONE & WEBSTER ENGINEERING CO., INC., ET AL Defendants	)	ORDER

BEFORE: KRUPANSKY and NORRIS, Circuit Judges: and MILES*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

October 19,1990

_____

Leonard Green, Clerk

_____

*Hon. Wendell A. Miles sitting by designation from the Western District of Michigan.

18 USC ** 208. Acts affecting a personal financial interest

(a) Except as permitted by subsection (b) hereof, whoever, being an officer of the executive branch of the United States Government, of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest--

Shall be fined not more than $10,000, or imprisoned not more than two years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and

makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the Federal Register, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services. In the case of class A and B directors of Federal Reserve banks, the Board of Governors of the Federal Reserve System shall be the Government official responsible for appointment.

(As amended Pub.L. 95-188, Title II, ** 205, Nov. 16, 1977, 91 Stat. 1388.)